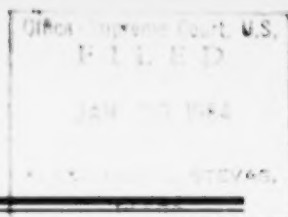


83 - 1200

No. 83-



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC.,
ASSIGNEE OF BERG MILL SUPPLY CO., INC., CONSOLIDATED
FIBRES, INC., PAPER FIBERS, INC., and SASSOON
INTERNATIONAL CORPORATION,

Petitioners,

v.

AMERICAN MAIL LINE, LTD., PACIFIC WESTBOUND
CONFERENCE, JAPAN LINE, LTD., KOREA MARINE TRANSPORT
CO., LTD., MITSUI O.S.K. LINES, LTD., SEA-LAND SERVICE,
INC., SHOWA LINE, LTD., *et al.*,

Respondents.

**APPENDIX IN SUPPORT OF PETITION FOR
A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT**

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OPINION AND JUDGMENT OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT,
ISSUED AND FILED ON NOVEMBER 14, 1983,
WHICH IS THE SUBJECT OF THE PETITION FOR
CERTIORARI IN THIS CASE

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-5551
DC # CV-82-895-LTL

NATIONAL ASSOCIATION OF RECYCLING
INDUSTRIES, INC., *et al.*,
Plaintiffs-Appellants,
v.
AMERICAN MAIL LINE, LTD., *et al.*,
Defendants-Appellees.

OPINION

Appeal From The United States District Court For The
Central District Of California, Lawrence T. Lydick, District
Judge, Presiding; Argued And Submitted September 9, 1983

Before: SCHROEDER and CANBY, Circuit Judges, and HOFF-
MAN,* District Judge.

SCHROEDER, Circuit Judge.

This appeal from the dismissal of an antitrust action requires this court to interpret the antitrust exemption contained in section 15 of the Shipping Act of 1916, 46 U.S.C. § 814 (1976). Section 15 immunizes from the antitrust laws conferences of common carriers that engage in collective rate-making, provided that the rate-making is authorized by agreements which the Federal Maritime Commission (FMC) has approved and provided further that all rates have been properly filed with the FMC. Although individual rates require no separate FMC approval to take effect, under § 18(b)(5) of the Shipping Act,

*Honorable Walter E. Hoffman, Senior United States District Judge, Eastern District of Virginia, sitting by designation.

the FMC can later disapprove rates that it finds so unreasonably high or low that they are detrimental to United States commerce. 46 U.S.C. § 817(b)(5)(1976). The principal issue in this case is whether shipping rates that the FMC has not disapproved have antitrust immunity if, as plaintiffs allege, they violate § 18(b)(5).

This action was brought by the National Association of Recycling Industries, Inc. (NARI), a trade association of wastepaper exporters to the Far East, and three of its member firms, against a group of common carriers who are present or former members of the Pacific Westbound Conference (PWC). The PWC is a rate-setting organization acting under an FMC-approved agreement. NARI claims that the PWC's rates for shipping wastepaper, which were otherwise authorized by the conference agreement and properly filed with the FMC, are unreasonably high and discriminate against NARI's members. They argue that the rates violate the antitrust laws by preventing wastepaper exporters from competing with exporters of woodpulp and woodchips, rival products in the paper manufacturing process. The district court dismissed the case on the basis of the antitrust immunity granted by section 15 and rejected NARI's contention that section 15 immunity should not apply if the rates are unreasonably high. We affirm.

NARI's antitrust claim has emerged from eleven years of administrative and judicial proceedings involving the PWC's wastepaper rates. In 1972, the FMC began an investigation of possible violations of sections 15, 16 First, 17 and 18(b)(5) of the Shipping Act. 46 U.S.C. §§ 814, 815, 816 and 817(b)(5)(1976). In 1977, the Administrative Law Judge held that the rates violated sections 15 and 18(b)(5), but in March 1979, the FMC reversed the ALJ's decision and found the wastepaper rates to be lawful.

On NARI's petition for review, the District of Columbia Circuit vacated the FMC's approval of the wastepaper rates. *National Association of Recyclers, Inc. v. FMC*, 658 F.2d 816 (D.C. Cir. 1980). There the court stated that it "appear[ed]

inescapable" that the rates violated section 18(b)(5) of the Shipping Act. *Id.* at 825. Rather than affirming the ALJ's statements concerning antitrust immunity, however, the court ruled only that the FMC could not approve the rates based on the existing administrative record. *Id.* at 829. Although the FMC has held its docket open for final determination of the rates' legality, all litigation has since shifted to this antitrust action.

NARI now seeks treble antitrust damages for the entire period since proceedings began in 1972, arguing that because of the District of Columbia Circuit's indication that the PWC's wastepaper rates violated section 18(b)(5), the rates have never been lawful and therefore do not qualify for section 15 immunity. Section 15 states:

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1 to 11 and 15 of Title 15, and amendments and Acts supplementary thereto.

The exemption granted by section 15 has been extended to include "activities conducted pursuant to approved agreements" as well. *Yellow Forwarding Co. v. Atlantic Container Line*, 668 F.2d 350, 352 (8th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982).

As so construed, the statute reveals a major textual flaw in plaintiffs' position. While NARI argues that the antitrust immunity does not apply because the rates are unlawful under section 18, the immunity contained in section 15 extends to activities lawful "under this section," that is, section 15. As long as the FMC has not disapproved the rates they are lawful under section 15, and appear to be entitled to immunity under the language of the statute.

Furthermore, Supreme Court case authority does not support NARI's interpretation of section 15. In contending that a rate which may be described as "unlawful" under section 18(b)(5) is outside the scope of section 15 immunity, NARI

relies upon language in *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 86 S. Ct. 781 (1966), that "unlawful rate-making activities are not exempt." *Id.* at 217, 86 S. Ct. at 784. The holding in *Carnation Co.*, however, is limited to agreements which the FMC has not approved. *Id.* at 216, 86 S. Ct. at 783. In later cases, the Supreme Court has indicated that the approval process itself shields conference agreements from the antitrust laws. See *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 728, 93 S. Ct. 1773, 1776 (1973); *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 271, 88 S. Ct. 929, 935 (1968).

Other courts and the FMC have construed section 15 to mean that activities authorized by approved agreements receive antitrust immunity even if they violate other Shipping Act provisions or other statutes. See *Yellow Forwarding Co. v. Atlantic Container Line*, 498 F. Supp. 105 (E.D. Mo. 1980), *aff'd*, 668 F.2d 350 (8th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982); *Baton Rouge Marine Contractors, Inc. v. Cargill, Inc.*, 1976-2 Trade Cas. (CCH) ¶ 61,212 (E.D. La. 1976). See also *Dreisbach v. Murphy*, 658 F.2d 720 (9th Cir. 1981). The same principle can be applied from the other direction as well; a rate which is set under an agreement that the FMC has not approved does not enjoy antitrust immunity. See *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. at 217, 86 S. Ct. at 784. Moreover, carriers acting under approved agreements lose their antitrust immunity if they continue to charge rates that the FMC has disapproved. 46 U.S.C. § 814 (1976).

Plaintiffs in this case, however, seek to impose retroactive antitrust liability for allegedly unreasonably high rates which have been set pursuant to an approved agreement and which have not yet been disapproved by the FMC. That result in our view would be fundamentally contrary to the Congressional intent behind the Shipping Act's regulatory scheme. The possibility of such potential retroactive liability for rates later declared unlawful would place carriers in a position of great uncertainty and would force them to seek formal FMC approval in connection with every rate change. Yet the language of

section 15 clearly indicates that Congress intended to give carriers the latitude to enact new rates, without separate approval, to meet quickly changing market conditions. See *Interpool Ltd. v. FMC*, 663 F.2d 142, 147-48 (D.C. Cir. 1980).

The only case in accord with NARI's reading of section 15 is *Sabre Shipping Corp. v. American President Lines, Ltd.*, 285 F. Supp. 949 (S.D.N.Y. 1968), cert. denied sub nom. *Japan Line, Ltd. v. Sabre Shipping Corp.*, 407 F.2d 173 (2d Cir.), cert. denied, 395 U.S. 922 (1969). *Sabre's* holding that section 15 immunity can be lost if shipping rates violate section 18(b)(5) has never been followed, and we agree with the district court that it is unpersuasive authority for imposing antitrust liability here.¹

Plaintiffs' efforts to find support in cases involving section 5a of the Interstate Commerce Act, 49 U.S.C. § 10706 (Supp. V 1981) are also unavailing. The Commerce Act analogy is of limited usefulness to a Shipping Act case since the statutes contain different criteria for approval of collective rate-making, and their legislative histories reflect different concerns. As Professor Sullivan has noted,

It is important to recognize that there is no single conception which defines the scope of the exemption for a regulated industry. Although one can draw on case law from one industry for guidance as to outcome in another, there are, in a sense, as many sets of exemption doctrines as there are industries subject to state or federal regulation. In each industry the process of accommodating regulatory

¹ *Sabre* was never the subject of appellate review on the merits. After the district court decided the immunity question, it denied the defendants' motion to stay the action pending FMC examination of the rates in question. The defendants filed an extraordinary petition for a writ of certiorari challenging the denial of the stay and the Second Circuit ruled only on the appropriateness of the petition. *Japan Line, Ltd. v. Sabre Shipping Corp.*, 407 F.2d 173, 174 (2d Cir. 1969). The case subsequently settled without trial. See *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F. Supp. 1339 (S.D.N.Y. 1969).

doctrine to antitrust doctrine is responsive to particulars such as those here referred to and, in some degree no doubt, to the degree of confidence which the court has and the quality of the regulatory performance by the particular regulatory agency.

L. Sullivan, *Handbook of the Law of Antitrust* § 239 at 743-44 (1977), quoted in *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1056 n.34 (9th Cir.), cert. denied, 52 U.S.L.W. 3234 (U.S. Oct. 3, 1983)(No. 83-88). However, even under the Commerce Act, courts grant antitrust immunity to rates established pursuant to ICC-approved agreements and in accordance with agency procedures. See *Board of Trade of City of Chicago v. ICC*, 646 F.2d 1187 (7th Cir. 1981).

NARI places particular reliance upon the District of Columbia Circuit's recent decision in *United States v. Bessemer Lake Erie Railroad Co.*, No. 82-2065 (D.C. Cir. Aug. 30, 1983). In *Bessemer*, defendants already had pleaded *nolo contendere* to criminal antitrust charges, and the court held that they could not invoke the civil antitrust immunity conferred by section 5a. Although *Bessemer* contains broad language criticizing abuse of immunized activities, the case does not support ignoring the express antitrust immunity granted under section 15 of the Shipping Act, because *Bessemer* involved both criminal charges and agreements wholly outside the scope of ICC-sanctioned rate-making.

NARI argues in the alternative that section 15 immunity does not apply because the wastepaper rates constitute conference activity outside the scope of the approved agreement. NARI reasons that since Article 2 of the PWC's conference agreement contains an anti-discrimination clause closely resembling sections of the Shipping Act² and since the PWC's shipping rates allegedly discriminate against wastepaper ex-

² Article 2 states:

There shall be no undue preference or advantage nor unreasonable discrimination against any consignor or consignee by any of the parties hereto.

porters, the rates are outside the scope of the agreement and therefore not entitled to immunity.

We agree with the district court's conclusion that if liability does not exist by virtue of the Shipping Act, it should not exist for a violation of similar provisions contained in the conference agreement. As the district court observed:

[i]t would be anomalous to hold that defendants are exempt from application of the antitrust laws even if violation of the Shipping Act could be established, and then to hold that defendants were so liable for writing into their agreement provisions of the Shipping Act that they were bound by anyway.

National Association of Recycling Industries, Inc. v. American Mail Line, Ltd., No. CV 82-895-LTL, slip op. at 16 (C.D. Cal. Dec. 3, 1982).

Our own decisions support the conclusion of the district court that so long as the activity in question, in this case rate-making, is authorized by the FMC-approved agreement, the defendants cannot be said to have acted outside the scope of the agreement. *Dreisbach v. Murphy*, 658 F.2d 720 (9th Cir. 1981); *American Export & Isbrandtsen Lines v. FMC*, 334 F.2d 185 (9th Cir. 1964). See also *Pacific Westbound Conference v. FMC*, 440 F.2d 1303 (5th Cir.), cert. denied, 404 U.S. 881 (1971).

NARI argues that, absent antitrust liability, it is left without any effective remedy. Private remedies do exist under the Shipping Act, however. These include: reparations as far back as two years prior to the proceedings' commencement for violations of sections 16 and 17, 46 U.S.C. § 821 (1976); prospective rate relief for violations of section 18(b)(5), 46 U.S.C. §§ 814, 822 (1976); and injunctive relief if an FMC order is disobeyed. 46 U.S.C. § 828 (1976). The FMC also may impose civil and criminal penalties up to \$5,000 per day. 46 U.S.C. §§ 815, 817(b)(6), 831 (1976). The path to more effective remedies begins in Congress, not the courts.

Plaintiffs' final attempt to salvage this action rests upon certain contracts that some of the defendants made with other carriers for the shipment of woodchips. Plaintiffs stress that these contracts, which provide for lower rates than the ones which plaintiffs must pay for shipping their wastepaper, demonstrate that the wastepaper rates are too high. The contracts for shipping woodchips may well be telling evidence for that proposition, but the contracts themselves are not alleged in any way to have been consummated in violation of the antitrust laws. Indeed, according to plaintiffs' complaint, the contracts were entered into as a product of free competition. The district court therefore properly dismissed the count of plaintiffs' complaint relating to woodchip rates on the grounds that it failed to state a claim.

Affirmed.

MEMORANDUM OF DECISION ISSUED ON DECEMBER 3, 1982, BY THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA IN THIS CASE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-82-895-LTL (Kx)

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., as assignee of the claims and actions of its member BERG MILL SUPPLY CO., INC., CONSOLIDATED FIBRES, INC., PAPER FIBERS, INC., and SASSOON INTERNATIONAL CORPORATION, (successor to M. SASSOON & Co., INC.), individually, and for and on behalf of themselves and a class consisting of all shippers of wastepaper from the West Coast of the United States and Canada to the Far East similarly situated,

Plaintiffs,

v.

AMERICAN MAIL LINE, LTD.; AMERICAN PRESIDENT LINES, LTD.; BARBER BLUE SEA LINE, formerly BARBER LINES, A/S; THE EAST ASIATIC Co., LTD., d/b/a EAC-KNUTSEN LINE; GALLEON SHIPPING CORPORATION; GLOBAL BULK TRANSPORT, INCORPORATED; ISTHMIAN LINES, INC., d/b/a STATES MARINE LINES; JAPAN LINES, LTD.; KAWASAKI KISEN KAISHA, LTD.; KOREA MARINE TRANSPORT Co., LTD.; A. P. MOLLER-MAERSK LINE; MARITIME COMPANY OF THE PHILIPPINES; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; OOCL-SEAPAC SERVICE-ORIENT OVERSEAS CONTAINER LINES, INC. (VOCC); PACIFIC FAR EAST LINE, INC.; PACIFIC WESTBOUND CONFERENCE; PENINSULAR-ORIENTAL STEAM NAVIGATION Co., d/b/a P & O ORIENT LINES; PHOENIX CONTAINER LINERS, LTD.; THE SCINDIA STEAM NAVIGATION Co., LTD.; SEA-LAND SERVICE, INC.; SEA-TRAIN LINES, INC.; SEATRAN INTERNATIONAL, S.A.; SHIPPING CORPORATION OF INDIA, LTD.; SHOWA LINE, LTD., formerly SHOWA SHIPPING Co., INC.; STATES MARINE INTERNATIONAL Co.; STATES STEAMSHIP Co.; TRANSPORTACION MARITIMA MEXICANA, S.A.; UNITED PHILIPPINE LINES; UNITED STATES LINES, INC.; YAMASHITA-SHINNIHON STEAMSHIP Co., LTD.; WATERMAN STEAMSHIP CORPORATION; and ZIM ISRAEL NAVIGATION Co., LTD.,

Defendants.

MEMORANDUM OF DECISION

This matter is here for decision on two motions by various defendants to dismiss or alternatively to stay, on plaintiffs' motion for summary judgment on issue of liability alone, and on defendant East Asiatic Co., Ltd.'s motion for summary judgment. The Court, having heard oral argument and having considered the voluminous papers and briefs filed herein, finds that plaintiffs' complaint fails to state a claim and must be dismissed pursuant to Rule 12(b)(6), *Federal Rules of Civil Procedure*.

This is an antitrust suit brought by the National Association of Recycling Industries, Inc. ("NARI"), a trade association for the paper recycling industry in the United States, and three of its member firms. The member firms seek to represent a class consisting of all firms which exported or shipped recyclable or recycled wastepaper by water during the time covered in the complaint from the West Coast of the United States and Canada to the Far East aboard the vessels of any of the defendants and who were subject to rates or charges fixed by defendants in combination or concert through defendant Pacific Westbound Conference ("PWC"). The class has not been certified.

PWC is a rate-fixing entity created by an agreement entered into by the individual defendants and approved by the Federal Maritime Commission ("FMC"). The other twenty-nine defendants are all common carriers who are or have been, during the time covered by the complaint, parties to the PWC conference agreement, and who engage in "PWC trade" (shipping traffic from the West Coast to the Far East).

Plaintiffs allege that the rates charged by defendants for transporting plaintiffs' wastepaper to the Far East are so "exceedingly high and unjustly discriminatory" that plaintiffs cannot successfully compete against shippers of processed woodpulp and virgin wood chips, raw materials in direct competition with wastepaper. Plaintiffs allege that the rates violate Sections 15, 16 First, 17 and 18(b)(5) of the Shipping Act, 1916, as amended, 46 U.S.C. §§ 814, 815 First, 816 and

817(b)(5), and that defendants consequently are liable for treble damages for *per se* price-fixing despite the limited antitrust immunity conferred upon defendants by Section 15 of the Act.

PRIOR PROCEEDINGS IN THIS CASE

Defendants' wastepaper rates have been the subject of administrative and judicial proceedings for the past ten years. On July 20, 1972 the FMC initiated an investigation of defendants' wastepaper rates, alleging possible violations of Sections 15, 16 First, 17 and 18(b)(5) of the Act. ALJ Seymour Glanzer issued his Initial Decision on August 15, 1977, finding that defendants had violated Sections 15 and 18(b)(5). The ALJ further found that "PWC misused its conference agreement and operated beyond the scope of the Commission's grant of partial immunity from the antitrust laws." No findings were made as to possible violations of Sections 16 First and 17. The ALJ ordered that the PWC Agreement be modified to exclude wastepaper rates from the conference's rate-fixing authority.

Exceptions to the Initial Decision were filed by both NARI, which had intervened in the proceeding, and by the PWC, among others. By Report dated March 9, 1979 the FMC reversed the Initial Decision, vacated the ALJ's order and found the PWC wastepaper rates lawful under Sections 15, 16 First, 17 and 18(b)(5).

NARI filed a petition for review in the D.C. Circuit. The Court of Appeals ordered that FMC approval of the rates at issue be vacated. *National Ass'n of Recycling Industries v. F.M.C.*, 658 F.2d 816 (D.C. Cir. 1980). The court failed to decide the propriety of the rates under Section 15, 16 First and 17, but found that "it appears inescapable that unreasonably high shipping rates for wastepaper set by the PWC monopoly detract from United States Commerce in violation of Section 18(b)(5) of the Act." 658 F.2d at 825. The court concluded by holding that "[w]e hold only that these rates may not be approved on the basis of the existing administrative record . . . the Commission is free to engage in any further administrative proceedings in this case not inconsistent with this opinion." 658

F.2d at 829. Thus, there has been no final adjudication of the legality of defendants' rates although, as the FMC admits in its papers, "[i]t seems probable that the Court [of Appeals] meant to direct the Commission to issue an order disapproving certain of PWC's wastepaper rates under Section 18(b)(5)."

The FMC did not conduct any further hearings; rather, on January 11, 1982 it served a notice on the parties requesting their views on the need for further administrative proceedings. In response to this notice NARI stated that the litigation had or would shift to this antitrust action and that no further proceedings before the FMC were necessary. PWC requested that the proceedings be held open in anticipation of this lawsuit so that the FMC could eventually determine whether the rates charged violated Section 15 or Section 18(b)(5). The FMC has not removed the proceeding from its docket.

AN OVERVIEW OF THE SHIPPING ACT

Section 15 of the Shipping Act, 46 U.S.C. § 814, allows ocean carriers operating in foreign commerce to enter into agreements, including conference agreements such as that establishing defendant PWC, for the general purpose of controlling competition between and among such carriers. The agreements can, and generally do, encompass the fixing of rates for the services offered by the carriers. These agreements must be approved by the FMC before they can be implemented: "before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement . . ." *Id.* Restated, "agreements . . . shall be lawful only when and as long as approved by the Commission . . ." *Id.* The FMC is required to disapprove, cancel or modify any agreement it finds to be "unjustly discriminatory or unfair as between . . . shippers, . . . or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest . . ." *Id.* Agreements "lawful under this section . . . shall be excepted from [the antitrust laws]." *Id.*

Although the agreements themselves must be approved by the FMC in order to be lawful, rates set pursuant to such agreements, "if otherwise in accordance with law, shall be permitted to take effect without prior approval" upon compliance with certain filing requirements. *Id.* Rates are subject to numerous statutory requirements. Under Section 16 First of the Act it is unlawful for a carrier "[t]o make or give any undue or unreasonable preference or advantage to any particular . . . description of traffic," and any carrier which violates the statute is guilty of a misdemeanor punishable by a fine. 46 U.S.C. § 815 First. Section 17 of the Act prohibits carriers from charging any rate "which is unjustly discriminatory between shippers" and grants the FMC certain powers to remedy any violation it finds. 46 U.S.C. § 816. Finally, Section 18(b)(5) of the Act requires the FMC to disapprove any rate "which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States." 46 U.S.C. § 817(b)(5). Civil penalties for continued violation of this section are also provided.

The Act also provides a private remedy for violations of the various rate regulations. Under 46 U.S.C. § 821 any person aggrieved by an alleged violation of the Act may file a complaint with the FMC and seek reparations for injuries caused by the violations. The FMC can order reparations "if the complaint is filed within two years after the cause of action accrued." *Id.* Prior to 1979 reparations were not awardable if a rate investigation was commenced by the FMC, 46 U.S.C. § 821, but a 1979 amendment to the Act removed the prohibition against reparations in FMC-initiated proceedings. 46 U.S.C. § 821(b). Where conference activities are not covered by Section 15's antitrust immunity aggrieved parties may proceed under either the antitrust laws or under the Shipping Act. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 224 (1966).

THE SABRE SHIPPING CORP. CASE

Plaintiffs' primary argument is that filed but unapproved rates established under the authority of an FMC-approved agreement are shielded from antitrust attack only if they meet the substantive requirements of the Shipping Act. Thus, where particular rates are found to violate the Shipping Act, the agreement which led to the establishment of those rates loses its antitrust exemption. As applied to this case, plaintiffs argue that since defendants' rates have been found to violate Section 18(b)(5), defendants are liable under the antitrust laws for *per se* price-fixing even though the FMC gave defendants permission to fix the rates in question.

Plaintiffs cite no legislative history to support their interpretation of Section 15's antitrust exemption. Rather, they rely upon the opinion in *Sabre Shipping Corp. v. American President Lines, Ltd.*, 285 F.Supp. 949 (S.D.N.Y. 1968), *cert. denied*, 407 F.2d 173 (2nd Cir.), *cert. denied*, 395 U.S. 922 (1969). In that case plaintiff, a competitor of two conferences and their members, alleged violations of Sections 1 and 2 of the Sherman Act in that defendants allegedly lowered their rates in order to drive plaintiff out of business (and thus out of competition with defendants). A Hearing Examiner for the FMC had found that the rates established by defendants (which were lowered drastically to drive plaintiff out of business and immediately thereafter raised to prior levels) violated § 18(b)(5); on that basis plaintiff argued that defendants' price-fixing conspiracy was not entitled to protection under Section 15's antitrust exemption. Defendants raised, by means of a motion to dismiss, the same arguments raised by defendants here.

The district court found that tariff rates, although allowed under Section 15 to take effect upon filing, were not automatically "lawful under this section" upon being filed within the meaning of Section 15. Rather, the court found that "something more than filing is necessary before defendants may obtain immunity . . ." 285 F.Supp., at 955. In support of this conclusion the court cited language from the Supreme Court

opinions in *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), and in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261 (1968). 285 F.Supp. at 955-56. The quoted language states, in part, that the antitrust exemption does not apply to the implementation of unapproved agreements, that the exemption for lawful rate-making activities implies nonexemption of unlawful rate-making activities, and that antitrust immunity results when an agreement is approved, not when it is filed. The court then reasoned that, since the FMC could not approve the rates at issue (because of the § 18(b)(5) violation), those rates could not be lawful or covered by the antitrust exemption. Neither appellate court which subsequently denied certiorari in the case appears to have reviewed the matter on the merits.

Analytically we find *Sabre Shipping* indistinguishable from the case at bar, although there are substantial factual differences between it and this case. *Sabre Shipping* is not, however, binding upon this court and we find that it has little persuasive value.

At the outset, it is our view that the *Sabre Shipping* court's reliance upon *Carnation Co.* and *Volkswagenwerk* is misplaced and that neither of those cases support, either directly or indirectly, the district court's decision. In *Carnation Co.* defendant conferences were sued under the antitrust laws after defendant PWC instituted a rate increase pursuant to an unapproved agreement with another conference. Defendants argued that the Shipping Act repealed all antitrust regulation of the rate-making activities of the shipping industry. The Supreme Court rejected this argument, stating that:

The Shipping Act contains an explicit provision exempting activities which are lawful under § 15 of the Act from the Sherman and Clayton Acts. This express provision covers approved agreements, which are lawful under § 15, but does not apply to the implementation of unapproved agreements, which is specifically prohibited by § 15. The creation of an antitrust exemption for rate-making activi-

ties which are lawful under the Shipping Act implies that unlawful rate-making activities are not exempt.

383 U.S. at 216-17.

The *Sabre Shipping* court cited this language for the proposition that unapproved tariff rates, if violative of a substantive rate provision of the Shipping Act, are not exempt from the antitrust laws. The language, however, refers to rate-making activities pursuant to an unapproved agreement, not rate-making activities authorized by an approved, antitrust-immune agreement. By the express terms of the Shipping Act the agreement under which the rates in *Carnation Co.* were established was unlawful and not exempt from the antitrust laws; by the express terms of the Act the agreement in this case was lawful and the rates established pursuant thereto allowed to take effect *without* separate approval by the FMC. As the language in *Carnation Co.* was taken out-of-context by the *Sabre Shipping* court, that language provides little support for the conclusion reached in *Sabre Shipping*.

Volkswagenwerk is similarly cited out-of-context to support a proposition it does not support. In *Volkswagenwerk* defendant shipping lines reached an agreement with a labor union whereby they agreed to set up a fund to compensate employees for technological unemployment. The lines then reached an agreement among themselves as to how to raise money for the fund. The agreement was not filed with the FMC. Petitioner *Volkswagenwerk*, aggrieved with the effect of the assessment formula upon itself (via passed-on costs), filed an administrative complaint with the FMC challenging the lawfulness of the agreement prior to filing and approval by the FMC. The FMC dismissed the complaint, contending that although the agreement was a "cooperative working agreement" within the meaning of Section 15, it was not the type of agreement which required approval because it did not concern competition for shipping business. The Supreme Court reversed the Court of Appeals decision affirming the FMC. Among the arguments advanced by the FMC for not requiring approval of the agreement was the argument that "a narrow construction of § 15

[i.e., a narrow construction of the types of agreements required to be filed and approved under § 15] should be adopted in order to minimize the number of agreements that may receive antitrust exemption." 390 U.S. at 273. In response to this argument the Supreme Court stated that:

[A]ntitrust exemption results, not when an agreement is submitted for filing, but only when the agreement is actually approved; and in deciding whether to approve an agreement, the Commission is required under § 15 to consider antitrust implications.

390 U.S. at 273-74.

This language was taken by the court in *Sabre Shipping* to support the proposition that rates filed pursuant to an approved agreement could not receive antitrust exemption until actually approved by the FMC. The language, however, was written in response to an argument based upon an incorrect assumption that filed agreements would as a matter of course be approved by the FMC (and receive antitrust immunity) despite their repugnancy to the antitrust laws. It did not address issues surrounding rates expressly allowed under the Shipping Act to take effect upon filing, without prior approval.

THE SCOPE OF THE ANTITRUST EXEMPTION

The Shipping Act, 1916 was passed against a backdrop of an existing conference system developed as a means of averting costly and destructive rate wars in the shipping industry. Congress recognized the advantages of the conference system, but also recognized that the conferences might well abuse their power if given an unqualified antitrust exemption without government supervision. *FMC v. Svenska Amerika Linien*, 390 U.S. 238, 242 (1968); see H.R.Doc. No. 805, 63rd Cong., 2d Sess. (1914) ("Alexander Report"). Congress thus created a predecessor to the FMC and gave it the authority to modify or disapprove conference agreements, and gave antitrust immunity to agreements receiving the approval of the Board. *Svenska Amerika Linien*, *supra*.

As evolved, the statutory scheme requires carriers to submit proposed agreements for approval before implementing them. In deciding whether to approve or disapprove a conference agreement the FMC is required to consider antitrust implications. *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 739 (1973). Modifications or cancellations of existing agreements also must be approved by the FMC. By the rule of *Carnation Co.*, *supra*, unapproved agreements are subject to the antitrust laws.

By its terms Section 15 is broad, requiring approval of "every agreement . . . or modification or cancellation thereof" which affects competition in the shipping industry. Courts, however, have realized that if read literally Section 15 could severely hamper the ability of shipping conferences to make even the most routine changes in rates or methods of operation; Section 15 has thus been construed conservatively so that agreements concerning routine operations relating to current rate changes have been held not to require separate approval. *Interpool Ltd. v. FMC*, 663 F.2d 142, 148 (D.C. Cir. 1980). In 1961 Congress implicitly adopted this construction of Section 15 by passage of, among other amendments, the tariff rate exception. *Id.*

Although rates and rate changes authorized by an approved conference agreement do not require separate approval by the FMC, they are by no means beyond review by that agency. As explained earlier, the FMC has been given numerous statutory tools to correct rates which violate any of the broad statutory standards rates must meet. Shippers injured by improper rates may recover reparations. "The scheme of regulation adopted thus permits the conference to continue operation but insures that their immunity from the antitrust laws will be subject to careful control." *Svenska Amerika Linien*, *supra*, at 243.

The Court is mindful of the rule that "[i]t is well settled that exemptions from the antitrust laws are to be narrowly construed." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440

U.S. 205, 231 (1979). This doctrine applies to express statutory exemptions such as that at issue here. *Id.*; *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973). Nevertheless, given the rather complete regulatory scheme of the Shipping Act, which both regulates the shipping industry and provides remedies (including reparations) for regulatory violations, given the history and policies behind the Shipping Act, and given the plain language of Section 15, it appears to this court that properly filed rates authorized by FMC-approved conference agreements are immune from the antitrust laws even if they are subsequently found to violate the Shipping Act.

Under Section 15, as stated earlier, agreements "lawful under this section . . . shall be excepted from [the antitrust laws]." The "lawfulness" of an agreement, as correctly argued by defendants, is only defined in the statute by whether or not the agreement has been approved by the FMC. Thus, "agreements . . . shall be lawful only when and as long as approved by the Commission. . ." It is beyond dispute that defendants' basic charter agreement has been approved by the FMC. Agreements as to particular rates, under the tariff rate exception, are allowed to take effect prior to specific FMC approval upon compliance with certain filing requirements. It is significant to note that this exception is to a clause providing that implementation of agreements before approval or after disapproval is *unlawful*. By implication, therefore, agreement to and implementation of properly filed rates is *lawful* within the meaning of Section 15's antitrust exemption.

It would appear, as defendants argue, that the protection of Section 15 would be flimsy indeed, and counter to Congress' stated intention of freeing the shipping industry from antitrust liability subject to regulatory control, if carriers and conferences could be authorized by the FMC to agree to tariff rates only to retroactively lose their protection every time particular rates are found violative of a substantive rate provision of the Act. The protection would be particularly flimsy since Congress was aware that determinations under Section 18(b)(5) are often close questions. *Federal Maritime Commission v.*

Caragher, 364 F.2d 709, 717 (2nd Cir. 1966). The effect of such a construction of Section 15 would be to force carriers to request approval of rates and rate changes prior to putting them into effect. Given the large number of conferences and much larger number of rates promulgated by each conference, such a task would surely swamp the FMC and lead to long delays in securing approvals. Moreover, "a conference that wished to adjust its rates to meet competition would be at a serious disadvantage if it were forced to wait for the Commission's approval before it acted." *Interpool Ltd.*, *supra*, at 147. Neither the language of the Shipping Act, its legislative history nor case law suggest that such a narrow construction of Section 15 would be proper.

This court's construction of Section 15 is supported by the decisions in *Baton Rouge Marine Contractors v. Cargill, Inc.*, 1976-2 Trade Cases ¶ 61,212 (E.D. La. 1976), and in *Yellow Forwarding Co. v. Atlantic Container Line*, 498 F.Supp. 105 (E.D. Mo. 1980), *aff'd*, 668 F.2d 650 (8th Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 2039 (1982). In both of these cases courts found that carrier actions, authorized by approved agreements, are insulated from antitrust scrutiny. The Court finds those decisions to be well-reasoned and persuasive, and will follow their holding.

PLAINTIFFS' OTHER CONTENTIONS

Plaintiffs raise several other minor arguments, only two of which need be addressed. First, plaintiffs note that defendants' agreement contains an anti-discrimination clause under which defendants may not discriminate against one shipper vis-a-vis another shipper. Plaintiffs argue that since defendants' rates discriminatorily favor woodpulp and wood chip shippers over wastepaper shippers, those rates are beyond the scope of defendants' agreement and subject to the antitrust laws. The PWC charter agreement, however, merely repeats the Shipping Act's prohibition against discrimination. It would be anomalous to hold that defendants are exempt from application of the antitrust laws even if violation of the Shipping Act

could be established, and then to hold that defendants were so liable for writing into their agreement provisions of the Shipping Act that they were bound by anyway.

Plaintiffs also argue that certain of the defendants entered into individual long-term contracts to ship wood chips, and that since these contracts were not submitted to the FMC for approval and were not authorized by the PWC agreement, they are not immune from the antitrust laws. This may be so, but plaintiffs have failed to explain how these contracts violate Sections 1 and 2 of the Sherman Act.

CONCLUSION

Approved agreements and activities, including the setting of rates authorized by such agreements, are immunized from the antitrust laws regardless of whether those rates are later found to be violative of substantive provisions of the Shipping Act. Accordingly, plaintiffs' complaint fails to state a claim with respect to the wastepaper and woodpulp rates established by defendants and considered in prior administrative hearings. The complaint may, however, state a claim with respect to certain of the carrier's individual contracts to ship wood chips. With respect to those contracts, plaintiffs shall have thirty days to file an amended complaint setting forth more fully their theory of relief. The motion to dismiss is otherwise granted. In view of the Court's resolution of the motion to dismiss, plaintiffs' motion for summary judgment is denied and the motion of defendant East Asiatic Co., Ltd. for summary judgment is deemed moot at this time.

The Clerk of the court will serve copies of this Order by United States mail upon counsel of record for the parties.

Dated this 3 day of December, 1982.

/s/ Lawrence T. Lydick
LAWRENCE T. LYDICK
United States District Judge

**PETITIONERS' COMPLAINT UNDER THE
ANTITRUST LAWS IN THIS CASE**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL ACTION NO.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., as assignee of the claims and actions of its member BERG MILL SUPPLY Co., INC., CONSOLIDATED FIBRES, INC., PAPER FIBERS, INC., and SASSOON INTERNATIONAL CORPORATION, (successor to M. SASSOON & Co., INC.), individually, and for and on behalf of themselves and a class consisting of all shippers of wastepaper from the West Coast of the United States and Canada to the Far East similarly situated,

Plaintiffs,

v.

AMERICAN MAIL LINE, LTD.; AMERICAN PRESIDENT LINES, LTD.; BARBER BLUE SEA LINE, formerly BARBER LINES, A/S; THE EAST ASIATIC Co., LTD., d/b/a EAC-KNUTSEN LINE; GALLEON SHIPPING CORPORATION; GLOBAL BULK TRANSPORT, INCORPORATED; ISTHMIAN LINES, INC., d/b/a STATES MARINE LINES; JAPAN LINES, LTD.; KAWASAKI KISEN KAISHA, LTD.; KOREA MARINE TRANSPORT Co., LTD.; A. P. MOLLER-MÆRSK LINE; MARITIME COMPANY OF THE PHILIPPINES; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; OOCL-SEAPAC SERVICE-ORIENT OVERSEAS CONTAINER LINE, INC. (VOCC); PACIFIC FAR EAST LINE, INC.; PACIFIC WESTBOUND CONFERENCE; PENINSULAR-ORIENTAL STEAM NAVIGATION Co., d/b/a P & O ORIENT LINES; PHOENIX CONTAINER LINERS, LTD.; THE SCINDIA STEAM NAVIGATION Co., LTD.; SEA-LAND SERVICE, INC.; SEA-TRAIN LINES, INC.; SEATRAN INTERNATIONAL, S.A.; SHIPPING CORPORATION OF INDIA, LTD.; SHOWA LINE, LTD., formerly SHOWA SHIPPING Co., INC.; STATES MARINE INTERNATIONAL Co.; STATES STEAMSHIP Co.; TRANSPORTACION MARITIMA MEXICANA, S.A.; UNITED PHILIPPINE LINES; UNITED STATES LINES, INC.; YAMASHITA-SHINNIHON STEAMSHIP Co., LTD.; WATERMAN STEAMSHIP CORPORATION; and ZIM ISRAEL NAVIGATION Co., LTD.,

Defendants.

**Class Action Complaint For Treble Damages And Injunctive
Relief Under The Antitrust Laws (15 U.S.C. §§ 1, 2, and 15
U.S.C. § 15)**

DEMAND FOR JURY TRIAL

**COMPLAINT FOR TREBLE DAMAGES AND INJUNCTIVE
RELIEF UNDER THE ANTITRUST LAWS**

Plaintiffs herein, complaining of defendants, respectfully
allege:

PLAINTIFFS

1. Plaintiff National Association of Recycling Industries, Inc., hereinafter referred to as "NARI", is the trade association for the metals, paper, textile and rubber recycling industries of the United States. NARI, incorporated under and pursuant to the laws of the State of New York, maintains headquarters at 330 Madison Avenue in the City, County and State of New York, and its membership consists of firms located throughout the United States, all of which are engaged in the collection, processing and industrial utilization of, or foreign trade (export-import) in, recyclable or recycled metals, paper, textiles and rubber.

2. Plaintiff "NARI" brings this action against defendants under the antitrust laws as assignee of all claims and causes of action, legal and equitable, of its member Berg Mill Supply Co., Inc., a corporation duly organized under the laws of the State of California, with headquarters in Beverly Hills, California. NARI's assignor was and continues to be seriously injured in its business or property directly and solely by reason of defendants' illegal acts and violations of the federal antitrust laws hereinbelow alleged.

3. Plaintiff Consolidated Fibres, Inc., also a member of plaintiff NARI, is a corporation duly organized under and pursuant to the laws of the State of Delaware, with offices located in Los Angeles and San Francisco, California, and it too was and continues to be seriously injured in its business or property directly and solely by reason of defendants' illegal

acts and violations of the federal antitrust laws hereinbelow alleged.

4. Plaintiff Paper Fibers, Inc., likewise a member of Plaintiff NARI, is a corporation duly organized under and pursuant to the laws of the State of California, with offices located in Los Angeles, California, and it was and continues to be seriously injured in its business or property directly and solely by reason of defendants' illegal acts and violations of the federal antitrust laws hereinbelow alleged.

5. Plaintiff Sassoon International Corporation, formerly M. Sassoon & Co., Inc., also a member of plaintiff NARI, is a corporation duly organized under and pursuant to the laws of the State of California, with offices located in Los Angeles and Oakland, California, and it too was and continues to be seriously injured in its business or property directly and solely by reason of defendants' illegal acts and violations of the federal antitrust laws hereinbelow alleged.

6. Plaintiffs Consolidated Fibres, Inc., Paper Fibers, Inc. and Sassoon International Corporation bring this action against defendants individually, for and on behalf of themselves and a class consisting of all other members of plaintiff NARI and non-member firms similarly situated which, during any period of time covered by this complaint, exported or shipped recyclable or recycled wastepaper by water in foreign commerce from the West Coast of the United States and Canada to customers or markets in the Far East aboard any vessel operated by any of the defendant common carriers named in this complaint, and were required to pay rates or charges for such transportation fixed by defendant common carriers herein in combination or concert through defendant Pacific Westbound Conference.

DEFENDANTS

7. Defendant Pacific Westbound Conference, hereinafter referred to as "PWC", is a rate-fixing entity created and established by and pursuant to a contract or agreement executed

and modified from time to time by defendant carriers, which carriers are identified in paragraphs 8(i)-(xxviii), inclusive, of this complaint, the principal carriers by water serving the so-called "PWC trade", subject to the approval of the Federal Maritime Commission and specific statutory restrictions contained in Sections 15, 18 and other sections of the Shipping Act of 1916, as amended (46 U.S.C. 814, 817, *et al.*).

PWC's headquarters are located in the State of California and the so-called "PWC trade", in which competition is regulated and controlled by defendants' rate-fixing activities, dual rate contract arrangements and other actions complained of hereinbelow, encompasses traffic moving by ocean from ports along the Pacific Coast of the United States and Canada, including the Port of Los Angeles, California, to ports in Japan, Korea, Taiwan, Siberia, China, Hong Kong, Thailand, Indo-China and the Philippines.

8. Upon information and belief, during all or significant portions of the period of time covered by this complaint, each and all of the defendant common carriers by water named hereinbelow were parties to the basic PWC conference agreement, they were engaged in the "PWC trade"; they maintained offices, agents and representatives in the Central District of California; they transacted business in said district; they were members of PWC; they participated in concert in the illegal PWC rate-fixing activities and dual rate contract arrangements; and they charged and collected from plaintiff NARI's assignor, the other plaintiffs herein and each member of the class of shippers represented herein, the grossly illegal rates fixed by defendants in combination and complained of hereinbelow, all in violation of the federal antitrust laws and with resulting serious injury to the businesses and property of plaintiffs and each member of the class they represent before this Court. Said defendant carriers, listed alphabetically, are as follows:

(i) Defendant American Mail Line, Ltd., a limited company or corporation whose headquarters were located in Seat-

tle, Washington, and which, upon information and belief, was, during the period covered by this complaint, merged with or otherwise acquired by defendant American President Lines, Ltd.

(ii) Defendant American President Lines, Inc., a limited company or corporation whose headquarters are located in Oakland, California. This defendant is sued herein directly and in its own right, and also as a successor-in-interest to defendant American Mail Line, Ltd.

(iii) Defendant Barber Blue Sea Line, formerly known as Barber Lines, A/S, upon information and belief, a limited company or corporation whose headquarters are located in Oslo, Norway. This defendant is sued herein directly and in its own right, and also as successor-in-interest to Barber Lines, A/S.

(iv) Defendant The East Asiatic Co., Ltd., a limited company or corporation operating as the "EAC-Knutsen Line" and whose headquarters are located in Copenhagen, Denmark. Upon information and belief, during the period covered by this complaint, this defendant merged with or otherwise acquired the "Knutsen Line", which theretofore operated in the "PWC trade" and was, in its own name and right, a member of and full participant in the illegal rate-fixing activities of defendant PWC. This defendant is sued herein directly and in its own right, and also as the successor-in-interest to Knutsen Lines.

(v) Defendant Galleon Shipping Corporation, a corporation whose headquarters are located in Manila, Philippines.

(vi) Defendants Global Bulk Transport, Incorporated, Isthmian Lines, Inc. and States Marine International Corp., three separate corporations whose principal offices were located in New York, New York, and which operated jointly in the "PWC trade", and were thus jointly a member of defendant PWC under the name "States Marine Lines." The defendants are sued herein for their participation in the unlawful combination and conspiracy complained of hereinbelow by and through "States Marine Lines."

(vii) Defendant Japan Line, Ltd., a limited company or corporation whose headquarters are located in Tokyo, Japan.

(viii) Defendant Kawasaki Kisen Kaisha, Ltd., a limited company or corporation whose headquarters are located in Kobe, Japan, and which operates in the "PWC trade" as "K-Line."

(ix) Defendant Korea Marine Transport Co., Ltd., a limited company or corporation whose headquarters are located in Seoul, Korea.

(x) Defendant A. P. Moller-Maersk Line, a limited company which operates as a consortium or joint service consisting of Dampskibsselskabet AF 1912 Aktieselskab and Aktieselskabet Dampskibsselskabet Svenborg and whose headquarters are located in Copenhagen, Denmark. This defendant is sued herein directly and in its own right, and as agent or representative of all participants in the aforesaid consortium.

(xi) Defendant Maritime Company of the Philippines, a limited company or corporation whose headquarters are located in Tokyo, Japan.

(xii) Defendant Mitsui O.S.K. Lines, Ltd., a limited company or corporation whose headquarters are located in Tokyo, Japan, and which operates in the "PWC trade" under the name "NYK Line."

(xiii) Defendant Nippon Yusen Kaisha, a limited company or corporation whose headquarters are located in Tokyo, Japan, and which operates in the "PWC trade" under the name "NYK Line."

(xiv) Defendant Orient Overseas Container Line, Inc. (OOCC), a limited company or corporation operating under the name "OOCL-Seapac Service" and whose headquarters are located in Hong Kong.

(xv) Defendant Pacific Far East Line, Inc., a corporation whose headquarters were located in San Francisco, California, but which, upon information and belief, suspended its business operations during the period covered by this complaint.

(xvi) Defendant Peninsular and Steam Navigation Company, a limited company or corporation whose headquarters were located in London, England.

(xvii) Defendant Phoenix Container Lines, Ltd., a limited company or corporation whose headquarters were located in Hong Kong.

(xviii) Defendant The Scindia Steam Navigation Co., Ltd., a limited company or corporation whose headquarters were located in Bombay, India.

(xix) Defendant Sea-Land Service, Inc., a Delaware corporation whose headquarters are located in Edison, New Jersey.

(xx) Defendants Seatrain Lines, Inc. and Seatrain International, S.A., corporations whose headquarters were located in New York, New York, and Oakland, California, respectively. Upon information and belief, defendant Seatrain Lines, Inc. was, while it and/or its said subsidiary was a member of defendant PWC, a Delaware corporation, and defendant Seatrain International, S.A. was a Liberian corporation and a subsidiary of defendant Seatrain Lines, Inc.

(xxi) Defendant Shipping Corporation of India, Ltd., a limited company or corporation with headquarters in Bombay, India.

(xxii) Defendant Showa Line, Ltd., formerly Showa Shipping Co., Inc., a limited company or corporation whose headquarters are located in Japan.

(xxiii) Defendant States Steamship Company, a limited company or corporation whose headquarters were located in San Francisco, California, and which operated in the "PWC trade" and as a member of defendant PWC under the name "States Line."

(xxiv) Defendant Transportation Maritima Mexicana, S.A., a limited company or corporation whose headquarters were located in Mexico.

(xxv) Defendant United Philippine Lines, a limited company or corporation whose headquarters were located in Manila, Philippines.

(xxvi) Defendant United States Lines, Inc., a Delaware corporation whose headquarters are located in New York, New York.

(xxvii) Defendant Yamashita-Shinnihon Steamship Co., Inc., a limited company or corporation whose headquarters are located in Tokyo, Japan, and which operates in the "PWC trade" and as a member of defendant PWC under the names "Y.S. Line" and/or "Yamashita-Shinnihon Line."

(xxviii) Defendant Waterman Steamship Corporation, a corporation whose headquarters are located in New York, New York.

(xxvix) Defendant Zim Israel Navigation Co., Ltd., a limited company or corporation whose headquarters are located in Haifa, Israel, and which operates in the "PWC trade" under the name "Zim Container Service."

9. Various other persons and other corporations, not named as defendants in this complaint, have participated as co-conspirators in the violations alleged herein and have performed acts, executed contracts and other documents and made statements in furtherance thereof.

JURISDICTION AND VENUE

10. This action is brought by plaintiff NARI, as assignee of its member identified hereinabove, and by plaintiffs Consolidated Fibres, Inc., Paper Fibers, Inc. and Sassoon International Corporation, successor to M. Sassoon & Co., Inc., individually and for and on behalf of the class of shippers described in Paragraph 6 hereinabove, under Section 4 of the Clayton Act (15 U.S.C. § 15) to recover threefold the damages sustained, interest and the costs of suit, including reasonable attorneys' fees, as allowed under the antitrust laws, against defendants, and each of them, for the injuries sustained by

plaintiffs and members of the class by reason of defendants' violations, as hereinafter alleged, of Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. 1, 2).

11. Jurisdiction of this Court is based on the provisions of Title 28 U.S.C. § 1337, entitled "Commerce and Antitrust Regulations", which states that "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. . . ." This Court also has jurisdiction over his action under the provisions of Title 28 U.S.C. § 1331, which grants district courts original jurisdiction of all civil actions arising under the laws of the United States.

12. Each of the defendants is found, transacts or does business, or has offices or an agent within the Central District of California. Many of the unlawful acts complained of hereinbelow occurred within the Central District of California, and much of the foreign and interstate trade or commerce described hereinbelow was and is conducted in, around and through the Port of Los Angeles. Venue as to defendants is thus properly in this district pursuant to the provisions of Title 15 U.S.C. §§ 15, 22 and Title 28 U.S.C. § 1391(b), (c) and (d).

CLASS ACTION ALLEGATIONS

13. As authorized and provided by Rule 23 of the Federal Rules of Civil Procedure, plaintiffs Consolidated Fibres, Inc., Paper Fibers, Inc. and Sassoon International Corporation sue herein for and on behalf of themselves and as representatives of the class described in Paragraph 6 hereinabove, of which class said plaintiffs, and each of them, are members.

14. The members of the class are so numerous that joinder of all members is impracticable. The claims of plaintiffs are typical of those of the class. Plaintiffs will fairly and adequately represent and protect the interests of the class. Except as to the amount of damages each member of the class has in-

dividually sustained, all other questions of law or fact are common to the class.

In addition, the prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; and here, the parties opposing the class have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and monetary relief with respect to the class as a whole. Moreover, the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, so that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

TRADE AND COMMERCE

15. Recyclable wastepaper, processed woodpulp and virgin wood chips, exported and shipped from ports along the West Coast of the United States and Canada to the Far East, are competing raw material fiber resources which are technologically and economically interchangeable in the marketplaces of the Far East, and which are utilized by Far East manufacturers to produce competing paper and paper products.

16. Plaintiffs herein, as well as plaintiff NARI's assignor and the class of exporters and shippers represented by plaintiffs, are engaged in the business of exporting and shipping recyclable wastepaper in interstate and foreign commerce from ports along the West Coast of the United States and Canada to markets in the Far East and to customers engaged in the production of paper and paper products in the Far East; and in the normal course of business, they regularly and necessarily compete in the Far East, both with wastepaper exporters and shippers from other nations and with large, in-

tegrated forest products companies that export and ship virgin wood chips and/or processed woodpulp from ports along the West Coast of the United States and Canada to the Far East.

17. During the period of time covered by this complaint, a cheap, abundant supply of recyclable wastepaper was consistently available in the United States and Canada for exportation and shipment from the West Coast of those two nations to the Far East to meet the huge, growing demand of several nations in the Far East for the aforesaid interchangeable raw material resources there required to manufacture paper and paper products.

However, while the prices of recyclable wastepaper on the West Coast of the United States and Canada were relatively low and thus very attractive and highly competitive for buyers in the Far East, ocean freight rates for the transportation of wastepaper from the West Coast of the United States and Canada to the Far East, fixed by defendant common carriers herein in concert and combination by or through defendant Pacific Westbound Conference, were simultaneously exceedingly high and unjustly discriminatory—and when those freight rates were included in the delivered prices of wastepaper offered for sale in the Far East, it was difficult and often impossible for plaintiffs, plaintiff NARI's assignor and the class of shippers represented by plaintiffs herein to compete, or to earn a fair, reasonable profit on sales they were able to make in the Far East.

18. Moreover, since during most of the period covered by this complaint, defendant common carriers herein and their rate-fixing association, defendant Pacific Westbound Conference, enjoyed effective monopoly control over the transportation of wastepaper from the West Coast of the United States and Canada to the Far East, plaintiffs, plaintiff NARI's assignor and the class of shippers represented by plaintiffs herein had little or no choice but to ship their wastepaper to the Far East on vessels operated by defendant common carriers and to pay the extremely high rates for such transportation fixed by

the monopoly through defendant Pacific Westbound Conference. In addition, in order to ship wastepaper at all aboard defendant carriers' vessels, plaintiffs, plaintiff NARI's assignor and the class of shippers represented herein had to comply with defendants' "dual rate system." The "dual rate system", with its contract and non-contract rate structure, had the effect of locking wastepaper shippers into utilizing transportation supplied by defendant carrier members of PWC. Generally, under the "dual rate system", a shipper must either agree to continue exclusively to patronize vessels operated by defendant carrier members of defendant PWC, in which case the shipper obtains the advantage of the "contract rate" uniformly offered by PWC members, or refuse to sign the exclusive use agreement and pay rates as much as 15% higher to ship his goods in the same "PWC trade" aboard vessels operated by defendant members of PWC.

Consequently, in 1971, for example, defendant carrier members of defendant PWC carried more than 89% of all wastepaper transported from the West Coast of the United States and Canada to the Far East, and in 1972 and 1973, PWC's members monopolized approximately 95% of all such wastepaper shipments.

As a result, during the period covered by this complaint, plaintiffs, plaintiff NARI's assignor and the class of wastepaper shippers represented herein were required by defendant carriers and their PWC monopoly to pay rates for the transportation of wastepaper to Japan which were 174% to 268% higher than the Pacific Coast price or value of the exported wastepaper. Similarly, on shipments to Korea, defendants exacted rates fixed by the PWC monopoly which exceeded the Pacific Coast price or value of the exported wastepaper by 201% to 309%. In such cases, purchasers of wastepaper in the Far East were paying mostly for *freight*, and plaintiffs, plaintiff NARI's assignor and the class of wastepaper shippers represented herein were severely injured both in their businesses and in their ability to compete in the Far East with sellers of wastepaper from other nations and sellers of virgin

wood chips and processed woodpulp from the United States and Canada.

19. Furthermore, while defendants were forcing plaintiffs, plaintiff NARI's assignor and the class of wastepaper shippers represented herein to pay the aforesaid extraordinarily high rates, fixed by defendant carriers in combination through the PWC monopoly, defendants were simultaneously acting, both individually and in concert, to favor competing the shippers of virgin wood chips and/or processed woodpulp with extraordinarily low rates, arrived at through free and open rate competition among defendant carriers. First, through defendant PWC, defendant carriers agreed to maintain "open rates" for shippers of woodpulp from the West Coast of the United States and Canada to the Far East. Thus, each defendant carrier member of PWC was permitted by PWC individually to fix its own rates for woodpulp shipments at any level, in free, open competition with all other carriers. Consequently, shippers of woodpulp (mostly, the large, integrated Pacific Coast forest products companies) were, during the period covered by this complaint, able to ship woodpulp from the Pacific Coast to Japan at rates charged by defendant carriers herein which amounted to only 10.7% to 22% of the Pacific Coast value of the exported woodpulp, with the result that competing U.S. woodpulp and wastepaper shippers on the West Coast of the United States paid the following charges or prices to ship identical 45,000 pound containers loaded with their competing commodities to Japan aboard vessels operated by defendants herein:

Wastepaper shippers	- \$783.00
Woodpulp shippers	- \$371.00

Similarly, competing shipments to Korea, made during the period covered by this complaint, resulted in the following freight charges to competing U.S. woodpulp and wastepaper shippers for transportation of identical, loaded 45,000 pound

containers, carried side-by-side aboard defendants' ships from the Pacific Coast to the same ports in Korea:

Wastepaper shippers	- \$904.00
Woodpulp shippers	- \$495.00

20. Concomitantly, defendant carriers herein, principally those with headquarters in Japan, favored competing shippers of virgin wood chips (again, the large, integrated Pacific Coast forest products companies) with even more beneficial rate arrangements discriminatorily arrived at through free and open competition among defendant carriers. During the period covered by this complaint, some or all of the defendant Japanese member lines of defendant PWC entered into individual long-term (10 years or more) contracts with competing shippers of virgin wood chips located on the Pacific Coast of the United States or Canada, pursuant to which those defendants agreed to carry wood chips from the Pacific Coast to the Far East for rates per ton far lower than even the lowest rate charged by any of the defendant carriers herein for the transportation of processed woodpulp. Thus, while plaintiffs and the class of wastepaper shippers they represent herein were forced to pay rates as high as \$57.00 to \$63.00 a ton to ship containerized wastepaper to Japan aboard defendants' vessels during part of the period covered by this complaint, competing containerized woodpulp shippers simultaneously paid only \$32.00 a ton for the same transportation service, and competing virgin wood chip shippers paid only a fraction of the last-mentioned woodpulp rate per ton to move their commodity from the Pacific Coast to Japan, and upon information and belief, competing wood chips are still being transported by defendants in the "PWC trade" at the present time under and pursuant to these or similar long-term, low-rate contract arrangements. Consequently, during the period from 1968 to the present time, virgin wood chip shipments from the Pacific Coast to Japan, for example, grew steadily to the level of several million tons per year, while Japan imports only about 2% of its recyclable wastepaper requirements from the United States.

21. In addition, from time to time during the period covered by this complaint, defendants combined and conspired to fix unfair, unjustly discriminatory rates for selected shipments of wastepaper in the "PWC trade", solely for the purpose of protecting their monopoly position over wastepaper shipments generally and to restrain or prevent carriers who were not rate-fixing members of the PWC monopoly from effectively competing for such shipments in the "PWC trade." Thus, during certain periods, when plaintiffs and the class they represent herein were compelled by defendants to pay rates ranging from \$31.25 to \$55.80 a ton, depending on the measurements of wastepaper inside sealed containers, to ship their wastepaper in the "PWC trade", defendants simultaneously published tariffs pursuant to which defendants, or some of them, collected only \$10.88 a ton to ship identical containerized wastepaper to Japan on a so-called "mini-land bridge" basis (combination rail-water traffic), and they charged only \$20.00 a ton to ship identically containerized paper cubes (a compressed form of wastepaper) to Japan. Recently, in 1981, defendants established a temporary "special open rate" through the PWC monopoly of \$28.00 a ton for containerized wastepaper shipments from the Pacific Coast to Taiwan, while they insisted on maintaining rates for identical containerized wastepaper shipments from the Pacific Coast to Japan and Korea at \$49.00 a ton—a difference of \$21.00 a ton—albeit the shipping distance from the Pacific Coast to Taiwan is approximately 1,500 miles longer than the shipping distance between the Pacific Coast and Japan and Korea.

**PRIOR FEDERAL MARITIME COMMISSION
INVESTIGATION OF DEFENDANTS' MONOPOLISTIC
RATE-FIXING ACTIVITIES COMPLAINED OF HEREIN;
FINAL JUDICIAL DECISION OF ILLEGALITY UNDER
THE SHIPPING ACT**

22. Defendants hold only a limited immunity from the anti-trust laws for their combined, concerted rate-fixing activities in foreign or interstate commerce through defendant PWC. The Shipping Act of 1916, as amended (46 U.S.C. §§ 801, et

seq.), exempts rate-fixing activities which are *lawful* under that Act from the Sherman and Clayton Antitrust Acts (15 U.S.C. §§ 1, 2, 15, *et seq.*), but rate-fixing activities that are *not lawful* under the Shipping Act are *not* exempt from the Sherman and Clayton antitrust laws.

23. Under the Shipping Act of 1916, as amended, the Federal Maritime Commission, a regulatory agency of the United States Government, is charged with supervising and regulating defendants' combined rate-fixing activities under defendant PWC's conference agreement, and any activity found to be unjustly discriminatory or unfair as between U.S. shippers or exporters, or between exporters from the United States and their foreign competitors; or to operate to the detriment of the commerce of the United States; or to be contrary to the public interest; or to be in violation of any provision of the Shipping Act, is unlawful. In addition, Section 18(b)(5) of the Shipping Act (46 U.S.C. 817(b)(5)) states:

"The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States."

24. Under Section 22(b) of the Shipping Act, as amended (46 U.S.C. 821(b)), the Federal Maritime Commission is authorized, upon its own motion, to investigate rate and rate-fixing violations of the Shipping Act. The Supreme Court of the United States, in turn, has ruled that rates fixed by a combination of carriers through a conference such as defendant PWC, are violative of the Sherman Antitrust Act only if they are first ruled unlawful under the Shipping Act. Accordingly, the Supreme Court has also decided that a private suit for treble damages and/or injunctive relief, which alleges that such rates or rate-fixing activities are violative of the antitrust laws, may not be maintained and must be suspended or dismissed until it has first been determined whether the challenged rates or rate-fixing activities are unlawful under the Shipping Act.

25. In this case, the Federal Maritime Commission, upon its own motion, commenced the necessary preliminary investigation under the Shipping Act into the lawfulness of defendants' wastepaper rates and concerted rate-fixing activities on or about July 20, 1972. The Commission's order of investigation charged that defendants' wastepaper rates and concerted rate actions through defendant PWC were possibly violative of Sections 15, 16, 17 and 18(b)(5) of the Shipping Act, and said order stated:

"The Commission is aware of the many potential benefits to be derived from increased recycling of our national solid wastes through encouragement and development of existing and new ways and means for disposing of such waste. Wastepaper, for example, competes directly with virgin woodpulp both in the domestic and foreign trades and appears to be readily available for export from the United States at prices far lower than those charged for their virgin counterparts.

"However, the Commission has reason to believe that the rates charged by members of the PWC for transportation of wastepaper may preclude wastepaper from being competitive with virgin woodpulp.

"Rates on woodpulp are 'open,' allowing each Conference member to set rates at a level consistent with and based upon their individual operating expenses, while rates on wastepaper are fixed under the dual rate system. This permits exporters of woodpulp whose rates are 'open' to utilize the services of carriers having the lowest rates at the time of shipment, while exporters of wastepaper must exclusively use the Conference carriers at contract rates or refrain from signing the contract in order to use non-Conference carriers. . . .

"It is . . . questionable whether [wastepaper] rates have been established with proper regard to cost, value and other ratemaking factors. . . ."

26. The investigation before the Federal Maritime Commission and subsequent judicial review of the Commission's actions therein continued from on or about July 20, 1972 to on or about March 24, 1981, when the decision of the United

States Court of Appeals for the District of Columbia Circuit in *National Association of Recycling Industries, Inc. v. Federal Maritime Commission, Sea-Land Service, Inc. and Pacific Westbound Conference*, 658 F.2d 816 (D.C. Cir. 1981), became final. The Court of Appeals affirmed a previous decision rendered by the Federal Maritime Commission's Administrative Law Judge, who conducted the actual investigation proceedings, and the Court of Appeals ruled:

"In our examination of the record, . . . it appears inescapable that unreasonably high shipping rates for wastepaper set by the PWC monopoly detract from United States Commerce in violation of section 18(b)(5) of the [Shipping] Act." (658 F.2d 816, 825)

27. The Commission's Administrative Law Judge, whose decision was affirmed by the Court of Appeals as aforesaid, found that defendant carriers' wastepaper rates, established in concert through defendant PWC, were "so unreasonable as to be outrageously high"; that "wastepaper movement to the Far East has been hampered as a result of the exorbitant rates placed upon that commodity by PWC"; and that "PWC's wastepaper rates . . . have also caused a reduction of profit to wastepaper dealers." The Administrative Law Judge stated:

"The loss of profit was a direct result of PWC's members becoming joint venturers participating in the yield from wastepaper sales to the Far East. . . . [I]t is abundantly clear that PWC intended its tariff rates to intrude upon the dealers' profit."

The Federal Maritime Commission's Administrative Law Judge thus declared:

"With the foregoing discussion in mind, it is abundantly clear that in two separate but related respects, PWC's rate making practices, ostensibly under the protective umbrella of Agreement No. 57 [PWC's organic rate-fixing agreement] resulted in violation of Section 15.

"First, in fixing wastepaper rates so unreasonably high as to be a detriment to commerce, PWC misused its conference agreement to contravene the regulatory purpose of section 18(b)(5). In employing its agreement so in-

juriously, PWC operated beyond the scope of the Commission's grant of partial immunity from the antitrust laws. The abusive use of the agreement operated to the detriment of the commerce of the United States and contrary to the public interest. . . .

"Second, PWC's rate making practices were unjustly unfair as between wastepaper and woodpulp shippers, exporters and importers in violation of an express provision of section 15 and in disregard of the specific terms of Article 2 of [PWC's] Agreement No. 57. These illegalities also operated to the detriment of the commerce of the United States and contrary to the public interest. . . ."

28. The Commission's Administrative Law Judge thus recommended the following prospective mandatory injunctive relief for plaintiffs and the class of wastepaper shippers before the Court in this case:

"The best course to follow is to require modification of PWC's conference agreement. Wastepaper shall be eliminated from PWC's rate fixing authority and wastepaper rates shall be declared open. Member lines shall file and observe reasonable and fair wastepaper rates. This will have the beneficial effect of restoring the forces of competition within the conference to the transportation of a commodity which has long endured unreasonably high and grossly unfair conference rates. . . . This method was utilized [by the Commission] in *Imposition of Surcharge by the Far East Conference at Searsport, Maine, supra*."

29. Presently, more than four and one-half years after the Commission's Administrative Law Judge rendered the aforesaid decision and approximately eleven months after the Court of Appeals' aforesaid decision became final, plaintiffs and the class they represent herein are still without relief; defendants continue to violate the antitrust laws by fixing unlawful rates for the transportation of wastepaper in the "PWC trade" in concert through the PWC monopoly; those rates are still violative of Section 18(b)(5) of the Shipping Act of 1916, as amended; defendants, or some of them, still favor shippers of competing virgin wood chips, for example, with exceedingly low, discriminatory, long-term rates that amount to only a fraction of those plaintiffs and the class they represent

herein are required to pay to ship wastepaper to the Far East, and thus plaintiffs, plaintiff NARI's assignor and the class of shippers plaintiffs represent herein are continuing to suffer serious injury and damage to their respective businesses and property for which they now pray for relief in this action under the antitrust laws.

VIOLATIONS OF ANTITRUST LAWS ALLEGED AGAINST DEFENDANTS

30. During the period from in or about July, 1968 to the present time, defendants herein operated unlawfully under contracts or agreements by, between and among themselves and with other persons not named as defendants herein, and defendants engaged in a continuing combination and conspiracy in unreasonable restraint of the above-described interstate and foreign trade or commerce of the United States, in violation of Section 1 of the Sherman Antitrust Act, as amended (15 U.S.C. § 1).

31. During the period from in or about July, 1968 to the present time, defendants herein unlawfully combined or conspired with each other and with various other persons not named as defendants herein to monopolize or attempt to monopolize the above described interstate and foreign trade or commerce of the United States in violation of Section 2 of the Sherman Antitrust Act, as amended (15 U.S.C. § 2).

32. More specifically, during the aforesaid period of time, defendants violated Sections 1 and 2 of the Sherman Antitrust Act by combining and conspiring with each other and/or with various other persons not named as defendants herein to do, and by doing in concert or combination the following things, among others, the purposes or effects of which were unreasonably to restrain the trade or commerce of the United States involved in, and/or to monopolize or attempt to monopolize, the transportation by water of recyclable or recycled wastepaper from the Pacific Coast of the United States and Canada to the Far East, and the sale and utilization of recycl-

able or recycled wastepaper from the United States by paper manufacturers in the Far East.

(a) Defendant carriers executed, became parties to and operated in concert and combination under defendant PWC's conference agreement, as modified from time to time during the period covered by this complaint;

(b) Defendant carriers also became members of defendant PWC, and contracted or agreed to assess and collect, and did assess and collect, rates and other charges for the transportation of wastepaper by each of them that were strictly in accordance with the uniform tariffs, rates and charges fixed, established, published and enforced by defendants in concert through defendant PWC;

(c) Defendant carriers thereupon continuously and repeatedly acted in concert and combination through defendant PWC to fix, establish, publish, enforce and collect rates and other charges for the transportation of recyclable and recycled wastepaper from the Pacific Coast of the United States and Canada to the Far East which, after statutory investigation under the Shipping Act, have now been ruled unreasonably high and unlawful under Section 18(b)(5) of the Shipping Act of 1916, as amended [46 U.S.C. 817(b)(5)], by both the Federal Maritime Commission's Administrative Law Judge in charge of the investigation, and by the United States Court of Appeals for the District of Columbia Circuit in *National Association of Recycling Industries, Inc., et al. v. Federal Maritime Commission, et al., supra*. In this regard, the Commission's Administrative Law Judge ruled, on the basis of the record before him in said investigation:

"[I]n fixing wastepaper rates so unreasonably high as to be a detriment to commerce, PWC misused its conference agreement to contravene the regulatory purpose of section 18(b)(5). In employing its agreement so injuriously, PWC operated beyond the scope of the Commission's grant of partial immunity from the antitrust laws. The abusive use of the agreement operated to the detriment of

the commerce of the United States and contrary to the public interest."

(d) Defendants coupled the aforesaid unreasonably high, unlawful rates, uniformly charged in concert by all members of defendant PWC for the transportation of wastepaper in the "PWC trade," with strict combined enforcement of PWC's "dual rate system," under which U.S. wastepaper shippers were required by defendants either to agree to ship exclusively on vessels operated by PWC member lines or to pay additional freight charges ranging up to 15% for the privilege of shipping without an exclusive contract arrangement;

(e) Defendant carriers also acted in concert or combination through defendant PWC to "open" rates in the same "PWC trade" from the Pacific Coast of the United States and Canada to the Far East for shippers of processed woodpulp who regularly compete with shippers of recyclable and recycled wastepaper in the markets of the Far East, and during most of the period covered by this complaint, defendant carriers favored the competing woodpulp shippers with fully competitive rates, individually fixed far lower than those fixed and charged by defendants in concert for the transportation of wastepaper. In this regard, the Federal Maritime Commission's Administrative Law Judge ruled on the basis of the record developed during the aforesaid investigation under the Shipping Act:

"PWC's rate making practices were unjustly unfair as between wastepaper and woodpulp shippers, exporters and importers in violation of an express provision of Section 15 [Shipping Act] and in disregard of the specific terms of Article 2 of [defendant PWC's] Agreement . . . These illegalities also operated to the detriment of the commerce of the United States and contrary to the public interest."

(f) While simultaneously and continuously acting in concert or combination with the other defendants herein to fix, enforce and collect unreasonably high, unlawful rates for the transportation of wastepaper in the "PWC trade," some of the defendant carriers herein such as defendant Japan Line, Ltd.,

operated outside the PWC rate-fixing monopoly to enter into individual, long-term contracts with virgin wood chip shippers located on the West Coast of the United States and Canada and who regularly compete with plaintiffs and the class of wastepaper shippers they represent herein in the Far East, whereby those competing wood chip shippers were granted extremely low, exceedingly discriminatory rates for the transportation of their competing commodity in the "PWC trade" for periods of time ranging up to ten years or longer, many of which contract rates are still in full force and effect today. In this regard, the Federal Maritime Commission's Administrative Law Judge found:

"The lower grades of wastepaper, like old news, compete directly with woodchips, both of which are substitutes for groundwood pulp in papermaking. While woodchips are not carried by PWC members in conference service, tramp divisions of those members do carry woodchips at rates far below conference wastepaper and woodpulp rates. Although no market existed for woodchips before 1965, some 3,000,000 to 4,000,000 tons are now exported every year to the Far East. By contrast, although the Far East market for wastepaper preceded that of woodchips by years, old news now going to the Far East amounts to approximately 100,000 tons, an increase of only about 80,000 tons since 1967. . . . [T]hese facts do show that the Far East's demand for groundwood fiber has increased tremendously since 1966 and that old news is not participating proportionately to the detriment of wastepaper dealers."

(g) Moreover, from time to time, in order to preserve and protect defendants' monopoly position over shipments of wastepaper in the "PWC trade" to the maximum, as hereinabove alleged, defendants acted in concert or combination through defendant PWC periodically or temporarily to fix rates for selected containerized movements of wastepaper which were extremely unfair and discriminatory among competing shippers of wastepaper in the "PWC trade";

(h) Finally, during the period covered by this complaint, defendants acted in concert or combination to refuse to reduce

their unlawful, outrageously high rates for the transportation of wastepaper in the "PWC trade," and they have failed and refused to abandon their unlawful, concerted rate-fixing actions and activities even in response to the aforesaid decisions of the Federal Maritime Commission's Administrative Law Judge and the Court of Appeals.

EFFECTS

33. Defendants' unlawful combination and conspiracy in restraint of trade or commerce of the United States and defendants' combination or conspiracy to monopolize or attempt to monopolize such trade or commerce have had the following effects, among others:

(i) Rates for the transportation by water of recyclable or recycled wastepaper aboard defendants carriers' vessels in the "PWC trade" have continuously been uniformly fixed, maintained, enforced and collected at outrageously high, unreasonable levels found to be violative of Section 18(b)(5) of the Shipping Act by both the Federal Maritime Commission's Administrative Law Judge and the United States Court of Appeals for the District of Columbia Circuit after a thorough investigation under Section 22 of the Shipping Act;

(ii) Rate competition for the transportation of wastepaper in the "PWC trade" between and among defendant carriers, which together have, from time to time, monopolized and controlled as much as 95% of that traffic, has been restrained;

(iii) Plaintiff NARI's assignor, plaintiffs and members of the class of wastepaper shippers before the Court in this case have been deprived of the benefits of competition in the "PWC trade";

(iv) Competition in the Far East between plaintiff NARI's assignor, plaintiffs and the class of wastepaper shippers they represent herein and wastepaper shippers from foreign nations, on one hand, and competition between plaintiff NARI's assignor, plaintiffs and the class of wastepaper shippers they represent herein and shippers of processed woodpulp and vir-

gin wood chips from the Pacific Coast to the Far East, on the other, has likewise been restrained:

(v) From time to time, competition in the Far East between and among exporters and shippers of wastepaper from the United States has been restrained;

(vi) Defendant carriers have maintained effective monopoly control over extremely large percentages of the transportation of wastepaper in the "PWC trade," and they have utilized that monopoly position, beyond the scope of any exemption from the antitrust laws provided by the Shipping Act, to fix rates detrimental to the commerce of the United States and to the public interest in violation of the Shipping Act.

SUSPENSION OR TOLLING OF THE STATUTE OF LIMITATIONS

34. The running of any statute of limitations in this case has been suspended or tolled with respect to the claims and causes of action asserted herein by virtue of the provisions of Section 5(i) of the Clayton Act, as amended (15 U.S.C. § 16(i)), and/or by the doctrine repeatedly recognized by the Supreme Court of the United States whereby the statute of limitations is suspended or tolled on equitable grounds in circumstances such as those presented here.

35. As alleged hereinabove, the Federal Maritime Commission, an agency of the United States Government, instituted the required preliminary statutory investigation under the Shipping Act of defendants' wastepaper rates and combined rate-fixing activities in the "PWC trade" on or about July 20, 1972. That investigation led to a judgment of the United States Court of Appeals that defendants' wastepaper rates were unlawful under Section 18(b)(5) of the Shipping Act, and that judgment became final on March 24, 1981. The investigation docket is still pending before the Federal Maritime Commission, but in January, 1982, the Commission issued an order therein stating that no further administrative proceedings appear to be necessary.

36. As further alleged hereinabove, the Supreme Court of the United States has ruled that private suits for damages and/or injunctive relief under the antitrust laws against ocean carriers and their conferences with reference to their transportation rates and rate-fixing activities may not be maintained or prosecuted until after a finding by either the Federal Maritime Commission or a reviewing court that such rates and/or rate-fixing activities are unlawful under the Shipping Act.

37. The necessary finding of illegality under the Shipping Act having been established in this case, plaintiff NARI's assignor, plaintiffs and the class of wastepaper shippers they represent herein, now bring this action under the antitrust laws for injunctive relief and for damages sustained during the period from on or about July 20, 1968 to the present time, all applicable statutes of limitation having been tolled or suspended from and after July 20, 1972 when the Commission instituted the aforesaid investigation under the Shipping Act.

INJURY TO PLAINTIFFS AND MEMBERS OF THE CLASS

38. By reason of defendants' unlawful combination, conspiracy and monopolistic actions in violation of the Sherman Antitrust Act, plaintiff NARI's assignor, plaintiffs and the class of wastepaper shippers they represent herein have suffered injury and damage to their respective businesses and properties in the following respects, among others:

(i) Shipments of wastepaper in the "PWC trade" aboard vessels operated by defendant carriers were made by plaintiff NARI's assignor, plaintiffs and members of the class represented before this Court at unlawful rates and charges far higher than those that would have been paid in the absence of the illegal combination, conspiracy and monopoly;

(ii) Plaintiff NARI's assignor, plaintiffs and the members of the class suffered serious and substantial loss of profits on sales of wastepaper made in the Far East;

(iii) Plaintiff NARI's assignor, plaintiffs and the members of the class suffered serious and substantial loss of sales and

business in markets and to customers in the Far East, and their overall ability to sell and ship increased volumes of wastepaper in the Far East, and to compete in the Far East, was restricted, inhibited and restrained;

(iv) As found by the Federal Maritime Commission's Administrative Law Judge in the aforesaid investigation under the Shipping Act, plaintiff NARI's assignor, plaintiffs and the members of the class were actually constrained by the PWC monopoly to permit defendant carriers herein, in effect, to become "joint venturers participating in the yield from wastepaper sales to the Far East," while defendants simultaneously discriminated against plaintiffs and the members of the class by favoring their competitors, the shippers of processed woodpulp and virgin wood chips, with exceedingly low rates and charges, as well as long-term, low-rate contracts arrived at through free and open competition between and among defendant carriers.

39. As a result, plaintiff NARI's assignor, plaintiffs and each member of the class they seek to represent have sustained injury and loss to their businesses and property in amounts presently undetermined.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray:

A. That the Court determine that this action may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, and direct that reasonable notice of this action be given to all members of the class of wastepaper shippers represented by plaintiffs herein in the manner prescribed by Rule 23(c)(2) of the Federal Rules of Civil Procedure;

B. That the defendants' unlawful combination, concert and conspiracy alleged hereinabove be declared, adjudged and decreed to be an unreasonable restraint of interstate and foreign trade or commerce of the United States in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

C. That the defendants' unlawful monopoly, or attempt to monopolize, or combination or conspiracy between and among themselves and with other persons to monopolize the above-described interstate and foreign trade or commerce of the United States, be declared, adjudged and decreed to be in violation of Section 2 of the Sherman Antitrust Act (15 U.S.C. § 2);

D. That plaintiff NARI's assignor, plaintiffs and each and every member of the class represented by plaintiffs in this action recover threefold the damages determined to have been sustained by each of them by reason of defendants' unlawful actions, and that joint and several judgments in favor of plaintiff NARI's assignor, plaintiffs and each and every member of the class, respectively, be entered against the defendants, and each of them;

E. That all other orders, injunctions and judgments necessary be entered herein —

(i) to restrain and enjoin defendants, their officers, agents, attorneys and employees from continuing to combine and conspire under defendant PWC's conference agreement or any other contract or agreement to fix uniform rates or charges for the transportation by defendant carriers of wastepaper in the "PWC trade," wherever and however such rates or charges operate or tend to operate to restrain or monopolize trade or commerce of the United States in violation of Sections 1 or 2 of the Sherman Antitrust Act, or both, or which are otherwise unlawful; and

(ii) to require and direct defendants, as specifically authorized and provided by defendant PWC's own conference agreement, to "open" rates for the transportation of wastepaper by defendant carriers in the "PWC trade" so that the forces of competition may govern the fixing of such rates and charges in the future; and

(iii) to require and direct defendant carriers, and each of them, that, after wastepaper rates become "open" pursuant to this Court's order, each defendant carrier must promptly file with the Federal Maritime Commission, and thereafter continuously observe, charge, and collect, fair,

just, reasonable, non-discriminatory and lawful tariffs and rates for the transportation of wastepaper from the Pacific Coast to destinations in the Far East established through free and open competition among defendant carriers.

F. That each of the defendants, their successors, assignees, subsidiaries and transferees, and their respective officers, directors, agents and employees, and all other persons acting or claiming to act on behalf thereof or in concert therewith be perpetually enjoined or restrained from, in any manner, directly or indirectly, continuing, maintaining or renewing the aforesaid unlawful combination, conspiracy, agreement, understanding, concert, action or monopoly complained of hereinabove, or from adopting or following any course of action, agreement, practice, plan, program or design having a similar purpose or effect;

G. That this Court grant such other, further and additional relief as may be deemed just and proper; and

H. That plaintiff NARI's assignor, plaintiffs and the other members of the class represented by plaintiffs recover the costs of this suit, including interest and reasonable attorneys' fees, as provided by law.

DATED: February 23, 1982.

REAVIS & MCGRATH
RICHARD H. KEATINGE
MARSHALL G. MINTZ
EDWARD L. MERRIGAN

/s/ Marshall G. Mintz
MARSHALL G. MINTZ
Attorneys for Plaintiffs

Plaintiffs hereby demand trial by jury in this action.

DATED: February 23, 1982.

REAVIS & MCGRATH
RICHARD H. KEATINGE
MARSHALL G. MINTZ

EDWARD L. MERRIGAN

/s/ Marshall G. Mintz
MARSHALL G. MINTZ
Attorneys for Plaintiffs

**EXCERPTS FROM THE FEDERAL MARITIME
COMMISSION'S ADMINISTRATIVE LAW
JUDGE'S DECISION IN *FMC DOCKET NO. 72-35,
PACIFIC WESTBOUND
CONFERENCE—WASTEPAPER AND
WOODPULP FROM UNITED STATES WEST
COAST TO FAR EAST*, WHICH WAS AFFIRMED
BY THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT IN
*NATIONAL ASSOCIATION OF RECYCLING
INDUSTRIES, INC. V. FEDERAL MARITIME
COMMISSION, ET AL*, 658 F.2d 816, 829 (1980) —
AND WHICH EXCERPTS ARE PARTICULARLY
RELEVANT TO FACTUAL MATTERS
CONTAINED IN THE PETITION FOR
CERTIORARI**

FEDERAL MARITIME COMMISSION

NO. 72-35

**PACIFIC WESTBOUND CONFERENCE—WASTEPAPER
AND WOODPULP FROM UNITED STATES WEST COAST
TO FAR EAST**

PWC is found to have engaged in ratemaking practices resulting in rates and charges on wastepaper which were so unreasonably high as to be detrimental to the commerce of the United States in contravention of section 18(b)(5).

PWC is found to have engaged in ratemaking practices which operated to the detriment of commerce and were unjustly unfair as between shippers, importers and exporters and contrary to the public interest in violation of section 15.

PWC's Agreement No. 57 is ordered and modified. As modified, wastepaper shall be eliminated from the conference's rate fixing authority and wastepaper rates shall be declared open. Member lines shall file and observe reasonable and fair wastepaper rates.

* * *

**INITIAL DECISION OF SEYMOUR GLANZER,
ADMINISTRATIVE LAW JUDGE^{1*}**

By Order of Investigation, served July 20, 1972, the Commission instituted an investigation pursuant to sections 22, 15, 16, 17 and 18(b)(5) of the Shipping Act, 1916,² to determine whether the provisions of the Pacific Westbound Conference tariffs, and/or actions of its member lines pursuant thereto, related to the movement of wastepaper and woodpulp from United States West Coast ports to ports in Japan: (1) constitute unjust discrimination or unfair discrimination or unfair treatment as between carriers, shippers, or exporters or otherwise operate to the detriment of the commerce of the United States or are contrary to the public interest in violation of section 15 of the Act. (2) make or give an undue or unreason-

*All irrelevant footnotes have been omitted.

able advantage to any particular person, locality or description of traffic in any respect whatsoever, or subject any particular person, locality or description of traffic to any undue prejudice or disadvantage in any respect whatsoever in violation of section 16, First. (3) result in charging or collecting rates or charges which are unjustly discriminatory between shippers contrary to section 17. (4) result in rates or charges so unreasonably high or low as to be detrimental to the commerce of the United States contrary to section 18(b)(5). The Commission further ordered that the investigation shall determine what action would best ameliorate the condition in the event the rates, practices, rules or regulations of the Pacific West-bound Conference or actions of its member lines pursuant thereto as they relate to the aforesaid shipments are found to violate provisions of the Shipping Act, 1916.

* * *

CHART II
COMPARISON OF WEST COAST DEALER PRICES AND PWC FREIGHT RATES
TO SELECTED TYPES OF WASTEPAPER AND WOODPULP

Destination	Commodity	Value of Commodity Pacific Coast F.O.B. Dock (Per Official Board Market, as Adjusted	Ocean Freight Rate	Freight to Commodity Value Ratio	Carrier Revenue per 45,000 lb. Container
Japan Base Ports	Wastepaper: old corrugated containers	\$ 20.00	\$34.82	174%	\$793.00
	Woodpulp: unbleached sulphate pulp	132.00	16.50	12.5%	371.00
	Wastepaper: old newspapers	13.00	34.82	268%	793.00
	Woodpulp: groundwood pulp	75.00	16.50	22%	371.00
	Wastepaper: hard white shavings	65.00	34.82	53.5%	793.00
	Woodpulp: bleached sulphate pulp	154.00	16.50	10.7%	371.00
Inchon, Korea	Wastepaper: old corrugated containers	20.00	40.15	201%	804.00
	Woodpulp: unbleached sulphate pulp	132.00	22.00	16.7%	495.00
	Wastepaper: old newspapers	13.00	40.15	309%	804.00
	Woodpulp: ground woodpulp	75.00	22.00	29.3%	495.00
	Wastepaper: hard white shavings	65.00	40.15	61.8%	804.00
	Woodpulp: bleached sulphate pulp	154.00	22.00	14.3%	495.00

The wastepaper freight rate to commodity price ratio, depicted above, was eased during the period from April 1973 to November 1974 despite increases in freight rates because of significant increases in the wholesale price of wastepaper. However, starting in December 1974 and continuing through the end of 1975 the wastepaper freight to commodity ratio soared even higher than the 1972 ratio because the wholesale price dipped to levels below those which prevailed in 1972. On the other hand, the woodpulp freight to commodity ratio remained about the same despite increases in the freight rates. The post-1972 ratios are demonstrated by the Rate History chart, *supra*, the following notations of rate changes, and the wholesale price index summaries which appear below the paragraph showing the rate changes.

The freight rates for wastepaper remained virtually unchanged from August 1974 through November 14, 1975. On July 15, 1975, the long ton rate to Japan Base ports for wastepaper shipments under 75 cf. per 2000 pounds was increased from \$53.00 to \$63.00, but that increase incorporated the then current \$9.25 bunker surcharge plus an added \$.75. On November 14, 1975, the rate was changed to \$57.00. Also effective July 15, 1975, at least one PWC member filed a containerized woodpulp rate of \$32.00, including bunker surcharge, per ton.²²

* * *

3: VOLUME

Turning now to the volume of wastepaper movements via PWC vessels, it is noted that even in the face of the disproportionate freight to commodity ratio, volume generally increased and at times the increase was dramatic. The statistics for PWC wastepaper volume from 1967 through 1975 in short tons follow:

1967	58,239
1968	44,967
1969	60,666
1970	105,935

1971	97,514
1972	105,846
1973	264,153
1974	327,303
1975	294,370

Reference to other data is helpful in placing a perspective on those statistics. Forest products, such as woodpulp and woodchips, and recycled wastepaper are major raw material sources of fiber. Fiber is essential to the manufacture of paper products. Starting about 1973, there came into being a worldwide shortage of fiber which had a keen effect on Japan and Korea. Consequently in 1973, PWC carried 264,153 tons of wastepaper, of which 243,972 tons landed in Japan and Korea. The continued existence of the shortage is reflected by the volume of wastepaper shipped from Pacific Coast ports via PWC during 1974 despite increases in wastepaper dealer prices and increased ocean freight rates. (As will be seen later, woodpulp and woodchip volume remained high through 1974). In 1975, however, wastepaper volume declined from the 1974 level although dealer prices fell below the 1972 level and remained there for most of the year. Yet, as noted above, PWC made no downward rate adjustment in 1975 until November 14, 1975, a date approximately coinciding with the time when dealer prices regained the 1972 level.

The amount of woodpulp carried by PWC from 1967 through 1970 generally paralleled the wastepaper trend but in greater volume than wastepaper. During 1971 and 1972 there was near parity of movement. 1973 woodpulp movements nearly doubled 1972 volume but fell below wastepaper. A gradual decline in 1974 became precipitous in 1975. The tonnage for the entire period follows:

1967	203,165
1968	160,131
1969	191,728
1970	196,959
1971	98,972
1972	113,168

1973	205,556
1974	181,042
1975	79,689

The declining PWC woodpulp volume may be attributed in part to the effects of competition. For example, Japan and Korea, the predominant Far East consumers of woodpulp, imported 713,000 and 516,000²³ tons in 1974 and 1975, respectively. The precise extent to which wastepaper or woodchips (another source of fiber) volume may have affected woodpulp volume has not been shown on this record. However, it is clear that the increased reliance in Japan, particularly, and in Korea on woodchips has impacted heavily on woodpulp's declining volume. As shown by Dr. Brink, an expert witness sponsored by PWC, the market for woodchips was first established in 1965 and has grown steadily and spectacularly since. Woodchips, which compete directly with wastepaper and woodpulp, were carried by all of PWC's Japanese member lines under private non-conference contractual arrangements in specialized bulk carrying vessels until 1972. By 1972, those members carried 4,086,320 tons of woodchips. At the present time the record shows that at least one of those Japanese members, Japan Line, continues to carry woodchips under two private contractual arrangements entered into in 1971 and 1973, respectively, and running for a period of 10 years each. Under those contracts, Japan Line charts 2 vessels with cargo capacities of 25,000 and 32,000 tons to the purchaser of woodchips from a major American forest product supplier at continuing 10 year rates proportionately far below any per ton rate for woodpulp shown in the Rate History chart for 1971 or 1973.²⁴ Although the record does not show what percentage of

²⁴ The specific details of Japan Lines' contracts were ordered to be treated confidential. I see no necessity to make more particularized reference to those contracts than I have stated in the text. Accordingly, NARI's motion to remove the contents of Exhibit 99 from the cloak of confidentiality, on which decision was reserved, is denied.

total woodchip exports from United States Pacific Coast ports was carried by PWC members after 1972, the record does show the volume of woodchips delivered to Japan from 1973 through 1975, and based upon past history and the private contracts and in the absence of any evidence to the contrary, it may be inferred that a substantial proportion was carried by PWC members, albeit outside the conference agreement. The ton volume statistics for woodchips (pulpwood in chip form) carried from the contiguous United States Pacific West Coast ports to Japan for those years were:

1973	3,422,233
1974	3,760,212
1975	3,045,622

* * *

In the case of wastepaper, PWC dominates the transportation market because frequency, regularity and dependability of container service is necessary to shippers of that commodity and only PWC can provide those elements. However, that is not the only reason. The dual rate system with its contract and non-contract rate structure has the effect of locking wastepaper shippers into PWC. Generally under the dual rate system a shipper must continue to exclusively patronize the conference in order to obtain the advantage of the contract rate offered by conference members, which rate may be as much as 15% below the non-contract rate applicable to shippers who do not sign exclusive patronage contracts. Thus, even though other liner services may occasionally offer a container rate below the PWC contract rate, contract wastepaper shippers may not avail themselves of the temporary rate advantage.

Nevertheless, a small amount of wastepaper does move by other liner service and by tramp, but even that amount is dwindling. In 1971, 95.6% of wastepaper went by liner and 4.4% by tramp. For the first 10 months of 1973, liners carried 99% of the wastepaper. In 1971, PWC carried 93.4% of liner

volume and 89.3% overall. In 1972, PWC's participation rose to 98.2% of liner volume and 95% of combined volume.

* * *

D: HARM

It is economic axiom that all things being equal more cargo will move at lower rates, but this truism, standing alone, is not sufficient to warrant a finding that PWC's rates caused harm or mischief to wastepaper shippers. However, the record does show convincingly that wastepaper movement to the Far East has been hampered as a result of the exorbitant rates placed upon that commodity by PWC despite the increase in the volume of wastepaper moving to Far East destinations since 1971.

As seen, Consolidated Fibres' president has traveled to Japan, Taiwan and the Philippines to visit manufacturers in those countries who produce products made from woodpulp and wastepaper. He went to their mills, observed their operations and reviewed the economics which have prevented them from ordering increased quantities of wastepaper they need and want to replace their utilization of pulp. Those manufacturers would use ever increasing quantities of wastepaper generated in the United States if the delivered price in those countries were lower.

PWC views the testimony of the Consolidated Fibres' witness as hearsay, self-serving and therefore unreliable. The testimony may be hearsay in part but it is not unreliable. PWC has not countered the evidence with any witness of its own from the Far East to show that it is not true. Indeed, as also seen, PWC's own records confirm the truth of the evidence given by Consolidated Fibres' president. Wastepaper receivers in the Far East have requested PWC in writing to reduce the freight rate because the delivered price had gone so high that the receivers would have to shift to woodpulp unless PWC were to afford some price relief.

There is other evidence that wastepaper movement has been adversely affected by PWC's pricing policies.

Historically, the price of domestically produced wastepaper in Far East countries have been two to two and one-half times higher than that of wastepaper on the West Coast of the United States. This is obviously an initial disadvantage to West Coast wastepaper dealers desiring to compete in the foreign markets. Yet, they are able to sell their products in those markets because of the short supply of fiber and because American wastepaper has the advantage of a lower West Coast price than the primary source of fiber. However, the origin price inducement to purchase American wastepaper rather than using other sources of fibre is diminished because of the chilling effect PWC's rates have on the delivered price of wastepaper.

PWC suggests that the wastepaper dealer's remedy is to reduce the price of his product on the West Coast rather than causing PWC to reduce its rates. This is preposterous. The evidence clearly shows that for most of the times covered by this proceeding, about two-thirds of the delivered prices of wastepaper in the Far East consisted of ocean freight charges. Even if the West Coast sales price of wastepaper were lowered the effect on the delivered price would be slight.

Moreover, the West Coast dealer price for export could not be lowered. There is an established market for wastepaper on the West Coast and, while the price may fluctuate, wastepaper for export is sold at the same price as wastepaper intended for domestic consumption.

While there is no evidence of the wastepaper dealer's cost or profit in the collection and sale of that commodity,⁸⁰ the record shows that the volume of American wastepaper retrieved in the collection process increases as the market price of that commodity increases. In other words, the higher the dealer's market price, the greater is the incentive to the individual collector at the bottom of the pyramid. Theoretically, if the ocean freight costs were lower, the Far East receivers would order more wastepaper, the dealer could allocate more funds for collection, and spurred on by the financial reward, individ-

ual collectors would be induced to greater collection endeavor. In the case of wastepaper, experience shows that theory becomes fact, for historically a greater percentage of wastepaper is retrieved for further use in the recycling process during periods of enhanced incentive to the individual collector in the United States. By maintaining the exorbitant ocean freight rates thus allowing no leeway for collection incentive, PWC has not only inhibited the flow of wastepaper to the Far East, it has, in effect, insinuated its members into participation as joint venturers with wastepaper dealers in the marketing of that commodity in the Far East.

I find that PWC's wastepaper rates have not only adversely affected the volume of wastepaper movement, they have also caused a reduction of profit to wastepaper dealers.

It is misleading to point to the increase in the volume of wastepaper movement as proof that the PWC rates do not interfere with wastepaper shipments or harm wastepaper dealers. The lower grades of wastepaper, like old news, compete directly with woodchips, both of which are substitutes for groundwood pulp in papermaking. While woodchips are not carried by PWC members in conference service, tramp divisions of those members do carry woodchips at rates far below conference wastepaper and woodpulp rates. Although, no market existed for the woodchips before 1965, some 3,000,000 to 4,000,000 tons are now exported every year to the Far East. By contrast, although the Far East market for wastepaper preceded that of woodchips by years, old news now going to the Far East amounts to approximately 100,000 tons, an increase of only about 80,000 tons since 1967.⁴¹ The disparity in performance of these two nearly identical fiber resources diminishes the probative value of wastepaper's increasing volume as proof showing PWC's wastepaper rates are not unreasonably high. On the other hand these facts do show that the Far East's demand for groundwood fiber has increased tremendously since 1966 and that old news is not participating proportionately to the detriment of wastepaper dealers.

NARI has met both elements of its burden of proof. It has produced evidence demonstrating that the wastepaper rates are unreasonably high and detrimental to commerce. The evidence it produced is clear and convincing. On the other hand, PWC has failed to produce satisfactory evidence that its wastepaper rates are reasonable.¹⁰⁸ In weighing all the evidence, I find that NARI has sustained its burden of persuasion with clear and convincing proof that PWC wastepaper rates are so unreasonably high as to be detrimental to the commerce of the United States.

* * *

A comparison of West Coast dealer prices for selected types of wastepaper and woodpulp at the outset of the investigation shows that the wastepaper values were only about 15% to 42% of the comparative types of woodpulp, yet the lower valued commodities took rates which were 167 to 200% higher than the higher valued commodity. In addition, at the time the freight to commodity value ratio ranged from a low of 10.7% to a high of only 29.3% for each of the selected grades of woodpulp. These relationships remained substantially the same through most of the period covered by the investigation.

Based on the foregoing considerations, the wastepaper rates were so unreasonable as to be outrageously high.

* * *

The findings of fact detail the manifest harm suffered by wastepaper dealers as a result of PWC's rates on that commodity. In sum, the facts establish that wastepaper movement was inhibited¹²⁹ and the dealers suffered a loss of profit.

* * *

The loss of profit was a direct result of PWC's members becoming joint venturers participating in the yield from wastepaper sales to the Far East.

Although the damaging effect of absorbing a shipper's profit may be less tangible, it was long ago established in the law that

common carriers have no right to share in the profits of shippers, no matter how profitable the shippers' business may be. *Tift v. Southern Ry. Co.*, 10 I.C.C. 548 (1905), aff'd 138 F. 753, 767 (W.D. Ga. 1905), aff'd sub nom. *Southern Ry. Co. v. Tift*, 206 U.S. 428 (1907); *Central Yellow Pine Asso. v. Illinois C. R. Co.*, 10 I.C.C. 505 (1905), aff'd ____ F. ____ (E.D. La.) (no opinion was filed), aff'd sub nom. *Illinois C. & RR v. I.C.C.*, 206 U.S. 441 (1907).

* * *

In the matter under consideration here, the facts, while different, are not dissimilar, in their impact, to those in the lumber rate cases. PWC's members were realizing a profit on the transportation of woodpulp.¹³¹ Whatever the woodpulp profit might be, the profit on wastepaper was exceedingly greater because the wastepaper rate was double that of woodpulp and the cost of carriage of wastepaper was not greater than that of woodpulp.

The record does not disclose what the wastepaper dealers' profits were or whether a profit was earned at all on sales to the Far East at all times at the rates which appeared in PWC's tariff. Nevertheless, it is abundantly clear that PWC intended its tariff rates to intrude upon the dealers' profit. This is manifest from its suggestion that the dealers reduce their price despite the fact that 72% of the landed cost in Japan was the cost of ocean freight.

* * *

E: ULTIMATE CONCLUSIONS

PWC is found to have engaged in ratemaking practices resulting in rates and charges on wastepaper which were so unreasonably high as to be detrimental to the commerce of the United States in contravention of section 18(b)(5).

PWC is found to have engaged in ratemaking practices which operated to the detriment of commerce and were unjustly unfair as between shippers, importers and exporters and contrary to the public interest in violation of section 15.

PWC's Agreement No. 57 is ordered modified. As modified, wastepaper shall be eliminated from the conference's rate fixing authority and wastepaper rates shall be declared open. Member lines shall file and observe reasonable and fair wastepaper rates.

/s/ Seymour Glanzer
SEYMOUR GLANZER
Administrative Law Judge

Washington, D.C.
August 15, 1977

**EXCERPTS FROM AFFIDAVIT OF DONOVAN D.
DAY, JR., CHAIRMAN, PACIFIC WESTBOUND
CONFERENCE, WHICH ARE RELEVANT TO FAC-
TUAL MATTERS REFERRED TO IN THE PETI-
TION FOR CERTIORARI**

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 82 0895 LTL (Kx)

NATIONAL ASSOCIATION OF RECYCLING
INDUSTRIES, INC. *et al.*,

Plaintiffs,

vs.

AMERICAN MAIL LINE, LTD., *et al.*,

Defendants.

**AFFIDAVIT OF DONOVAN D. DAY, JR., IN SUPPORT OF
DEFENDANTS' OPPOSITION TO PLAINTIFFS' SUMMARY
JUDGEMENT MOTION**

DONOVAN D. DAY, JR., first being duly sworn, deposes and says:

1. I am the Chairman of the Pacific Westbound Conference ("PWC"). I have held this position continuously since January 1, 1972.

2. In accordance with the tariff filing requirements of the Shipping Act, 1916, the PWC publishes its rates and charges in tariffs on file with the Federal Maritime Commission ("FMC"). For some commodities, the PWC files "open minimum rates." Such a designation means that the conference member lines may charge at or above the minimum rate. The individual member lines file their rates on these open-rated commodities with the FMC in the open rate appendix accompanying the applicable PWC tariff item.

3. The published tariffs currently in effect for woodpulp (attached hereto as Exhibit A) and wastepaper (attached hereto as Exhibit B) can be summarized as follows (rates are in U.S.

dollars per metric ton (KT); density requirements are expressed cubic meters (M³) per KT):*

	TO JAPAN	TO TAIWAN	TO KOREA
WOODPULP, OPEN	OPEN	OPEN	OPEN
NOT EXCEEDING 1.56 M ³ /KT	MIN. \$59.00	MIN. \$67.00	MIN. \$67.00
WASTE-PAPER, SUBJECT TO WEIGHT MINIMUMS	\$65.00	OPEN MIN. \$39.00	\$66.00

* * *

/s/ Donovan D. Day, Jr.
DONOVAN D. DAY, JR.

CITY AND COUNTY OF SAN FRANCISCO
STATE OF CALIFORNIA

SUBSCRIBED AND SWORN TO BEFORE me this 13th day of July, 1982.

/s/ Margaret E. Smyth
MARGARET E. SMYTH
NOTARY PUBLIC

[NOTORIAL SEAL]

My commission expires: June 20, 1983

*These excerpts do not include Mr. Day's 1982 rate quotations for competing shipments to Manila, Hong Kong and Bangkok.

RELEVANT EXCERPTS FROM BASIC OPERATING
AGREEMENT OF RESPONDENT PACIFIC WEST-
BOUND CONFERENCE, AS APPROVED BY THE
FEDERAL MARITIME COMMISSION UNDER SEC-
TION 15 OF THE SHIPPING ACT OF 1916, AS
AMENDED, 46 U.S.C. 814

PACIFIC WESTBOUND CONFERENCE**FEDERAL MARITIME COMMISSION****AGREEMENT NO. 57**

As Amended and Approved through July 27, 1977

MEMORANDUM COPY

This MEMORANDUM OF AGREEMENT, made in the City of Vancouver, by and between the Parties signatory hereto, on the 8th day of January, in the year one thousand nine hundred and twenty-three (1923).

WITNESSETH

That the parties hereby associate themselves together in a Pacific Westbound Conference to promote commerce from or via the Pacific Coast Ports or points in United States and Canada to Ports or points in Japan, Korea, Taiwan (Formosa), Siberia, Manchuria, China, Hong Kong, Indo-China, Thailand, and the Republic of the Philippines unless prohibited by any Government regulatory body (it being understood that such commerce shall include all cargo, except as may be otherwise provided in the Tariffs, that may be shipped westbound via the Pacific Ocean, from or via the said Pacific Ports to the said countries or from any overland or other points in the United States or Canada via said Pacific Ports), and for the common good of shippers and carriers, by providing just and economical co-operation between the steamship lines operating in such trade. And to the accomplishment of that end the parties hereby severally agree with other as follows:

It is understood that this agreement is for the regulation of traffic and not of operation and only covers direct or transshipment rates, division of through rates, tariffs, brokerage and matters directly relating thereto.

ARTICLE 1

(a) All freight or other charges for transportation of cargo between the aforementioned ports or points shall be charged

and collected by the parties hereto, strictly in accordance with the Tariffs of rates and charges including tariffs of joint or other through rates and rules and regulations applicable thereto agreed to by the parties and not prohibited by any Government regulatory body; except that the ocean rate, or ocean portion of any joint or other through rate, on any commodity may be declared "OPEN" and subsequently closed by a two-thirds vote of regular members entitled to vote. Commodities on which rates have been declared "OPEN" and the extent to which the Conference relinquishes control over the booking and transportation thereof will be shown in Conference Tariffs.

* * *

ARTICLE 2

There shall be no undue preference or advantage nor unreasonable discrimination nor unfair practice against any consignor or consignee by any of the parties hereto.

ARTICLE 3

There shall be no payment or refund in respect of freight or compensation received and no absorption at loading or discharging ports of rail or coastal steamer freights or other charges, directly, or indirectly, by any of the parties hereto, except as may be agreed to by two-thirds of parties herein at any regular meeting of the Conference.

* * *

ARTICLE 5

The parties hereto shall meet together in Conference, not less than two times annually, at a time and place to be agreed upon. These meetings shall be presided over by a Chairman, or in his absence, a Vice Chairman, elected by the parties hereto, who shall also designate a Secretary to perform such duties as pertain to that office.

ARTICLE 6

The parties hereto shall abide and be governed by the Rules and Regulations contained in Appendix, attached hereto and made a part hereof, which may be amended by a two-thirds vote of those entitled to vote, except as otherwise specifically provided. No such amendment shall be carried into effect until it has been approved pursuant to Section 15 of the Shipping Act, 1916, as amended.

ARTICLE 7

The parties hereto shall consider and pass upon any matter involving discriminations, tariffs, freight, brokerage or other charges, or the regulation of westbound cargo between the aforementioned ports at any meeting of the Conference, provided that notice in writing has been given in accordance with the Rules and Regulations. If all of the parties hereto are present at any meeting, action may be taken on any matter within the scope of this agreement without prior notice thereof. Any such matter or thing brought before the meeting in the manner aforesaid and agreed to by two-thirds of the parties hereto, shall thereby become an agreement binding upon all the parties hereto, with the same force and effect as if expressly made a part of this agreement, except as otherwise provided in the Rules and Regulations of this Conference. Reference in this agreement to voting by all or a specific number of the members means only those members who are entitled to vote.

ARTICLE 8

Standing committees of designated representatives of the parties hereto may be appointed, which committees shall consider and recommend for adoption and agreement by the parties hereto schedules of tariff freight rates and charges to be charged and collected for the transportation of merchandise between any of the aforementioned ports, brokerage and any other matters within the scope of this agreement; and, provided that notice of the matter to be considered at any meeting has been given to the parties hereto by the Secretary, as

provided in Article 7 hereof, the parties hereto agree and stipulate with each other that they will be bound by the Agreement of two-thirds of their number, except as otherwise provided in the Rules and Regulations of this Conference, as to any tariff, freight rate, charge, brokerage, traffic regulation and/or any other matter within the scope of this agreement with the same force and effect as if expressly made a part hereof.

ARTICLE 9

Each member party to this agreement shall be entitled to a single vote in all matters to be decided by the vote of the general Conference, except that any member whose sailings have been discontinued for a period of three (3) calendar months, of which fact the member must notify the Secretary in writing, shall not be entitled to vote on rates, and any member whose sailings have been discontinued for a period of twelve (12) calendar months, of which fact the member must notify the Secretary in writing, shall not be entitled to vote on any Conference matter, including modification or cancellation of this Agreement. Upon resumption of sailing such a member shall again enjoy full voting privileges.

Notice of loss or restoration of voting rights shall be furnished promptly to the governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended.

* * *

ARTICLE 16

The expenses of maintaining and carrying on the Conference shall be borne as determined by the members.

ARTICLE 17

Any Party to this agreement may be eliminated therefrom by a vote of two-thirds of The Parties hereto entitled to vote, for failure to maintain a common carrier service or for failure to abide by all the terms and conditions of this agreement. Viola-

tion of any of the provisions of this agreement or any of the rules and regulations adopted pursuant thereto, or failure to permit examinations of books, records, accounts and documents by the Chairman or by the Neutral Body, or the refusal within 10 days after written demand therefor by the Chairman to participate in any arbitration held pursuant to the provisions of Articles 12 or 13 hereof or to abide by the decision of the Neutral Body or of any such arbitration and the omission of Any Party to replenish the security deposited under Article 10 hereof when the same shall have been depleted by resort thereto for the payment of Decided Liabilities shall constitute grounds for such elimination whether or not resort is had to any other procedures provided in this agreement.

* * *

ARTICLE 24

The parties hereto, shall agree upon Rules and Regulations which may be changed or added to at any meeting by a two-thirds vote of the parties hereto entitled to a vote.

ARTICLE 25

When a subject is placed before the Conference for consideration, no member shall divulge to any person, firm or corporation not a party hereto whether or not it is in favor of the proposal and after the matter has been acted on by the Conference, no Member shall divulge to any such person other than a party hereto how it or any other Member voted on a matter nor at any time divulge to a nonmember any information as to views expressed or positions taken by it or any other Member with respect to any matter which is or has been before the Conference whether Conference or Committee meetings or through correspondence, bulletins, memoranda or otherwise.

Each Member is bound in honor and has agreed to consider and maintain all questions and actions that may be considered or adopted in meetings or in correspondence in connection therewith as secret and confidential. All publicity concerning

Conference affairs, proceedings and discussions will be disseminated only through the Chairman.

Each party hereto has a duty to report to the Chairman any information as to a violation of this Article. The Chairman shall investigate any information indicating a possible violation and has the authority to employ outside assistance at Conference expense to assist in such investigation. Violations of this Article shall be dealt with in accordance with Article 13.

No provision in this Agreement shall be considered as a prohibition against a Member Line furnishing information requested by the governmental agency charged with the administration of Shipping Act, 1916, as amended.

* * *

ARTICLE 28

This Agreement may be executed in several parts, and the said parts shall read and be effectual as one instrument. Each of the parties hereto hereby expressly authorizes the Chairman to sign on its behalf and to file for approval with the agency charged with administering the Shipping Act, 1916, as amended, any amendments to this agreement and to the appendix to this agreement (Rules and Regulations) which have been duly adopted by the Conference by the vote and the procedures prescribed by this agreement or by the appendix to this agreement, respectively. Subsequent to the date of this agreement, any person, by the act of becoming a party to this agreement, shall thereby authorize the Chairman to sign and file amendments on its behalf as provided hereinabove.

ARTICLE 29

This Agreement may be executed in several parts, and the said parts shall read and be effectual as one instrument.

American President Lines Ltd.

(American Mail Line)

The East Asiatic Company Limited

Galleon Shipping Company

Japan Line, Ltd.

Kawasaki Kisen Kaisha, Ltd.

KNUTSEN LINE

Dampskibsaktieselskapet Jeannette Skinner

Skibsaktieselskapet Pacific

Skibsaktieselskapet Marie Bakke

Dampskibsaktieselskapet Golden Gate

Dampskibsaktieselskapet Lisbeth

Skibsaktieselskapet Ogeka

Hvalfangstaktieselskapet Sveroy

A. P. Koller, Maersk Line

Dampskisselskafet AF 1912 Aktidselskaf

Aktieselsklbet Dampskisselskabet Svendeors

Maritime Company of the Philippines

Nippon Yusen Kaisha (N.Y.K. Line)

Okakshosen Mitsuisenpaku Kaisha Ltd.

(Kitsui O.S.K. Lines, Ltd.)

Phoenix Container Liners (1976) Ltd.

Sea-Land Service, Inc.

Seatrain International S.A.

Showa Line Ltd.

States Steamship Company

United States Lines

Yamashita-Shinnihon Steamship Co., Ltd.

(Zim Container Service Division)

(Zim American Israel Shipping Co., Inc. General Agents)

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**STATUTORY ADDENDUM—RELEVANT PARTS
OF
SHERMAN AND CLAYTON ANTITRUST ACTS
AND
SHIPPING ACT APPLICABLE TO THIS CASE**

STATUTORY ADDENDUM
RELEVANT PARTS OF STATUTES
INVOLVED IN THIS CASE

1. The Sherman Antitrust Act, § 1, 15 U.S.C. § 1, as amended:

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.

2. The Sherman Antitrust Act, § 2, 15 U.S.C. § 2, as amended:

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708.

3. The Clayton Antitrust Act, § 4, 15 U.S.C. § 15, as amended:

§ 15. Suits by persons injured; amount of recovery; prejudgment interest

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying litigation or increasing the cost thereof.

As amended Sept. 12, 1980, Pub.L. 96-349, § 4(a)(1), 94 Stat. 1156.

4. The Shipping Act of 1916, § 15, 46 U.S.C. § 814, as amended:

§ 814. Contracts between carriers filed with Commission; definition of "agreement"; approval, disapproval, etc., by Commission; unlawful execution of agreements; conference agreements; assessment agreements; anti-trust laws exemptions; civil action for penalties; terminal leases exemption

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight of passenger or traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements, but does not include maritime labor agreements or any provisions of such agreements, unless such provisions provide for an assessment agreement described in the fifth paragraph of this section.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or, between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the

same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1 to 11 and 15 of Title 15, and amendments and Acts supplementary thereto.

5. The Shipping Act of 1916, § 18(b)(5), 46 U.S.C. 817(b)(5), as amended:

(5) The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.